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United States Court of Appeals
For the Ninth Circuit

PETER CROCKETT JACKSON, a minor, by John E.
Walker, his Guardian ad Litem, *Appellant*,

vs.

THE UNITED STATES NATIONAL BANK, PORTLAND,
OREGON, a national banking association;
DAVID LLOYD DAVIES; THE UNITED STATES
NATIONAL BANK, PORTLAND, OREGON, a na-
tional banking association, and DAVID LLOYD
DAVIES, as Executors under the purported
will and testament of Maria C. Jackson,
deceased; THE UNITED STATES NATIONAL
BANK, PORTLAND, OREGON, a national banking
association, and DAVID LLOYD DAVIES and
WILLIAM W. KNIGHT, as purported Trustees
appointed by said purported last will and
testament; and BLACK WHITE FOUNDATION,
a corporation, *Appellees*.

OPENING BRIEF FOR APPELLANT.

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United States Court of Appeals For the Ninth Circuit

PETER CROCKETT JACKSON, a minor, by John E.
Walker, his Guardian ad Litem, *Appellant*,
vs.

THE UNITED STATES NATIONAL BANK, PORTLAND,
OREGON, a national banking association;
DAVID LLOYD DAVIES; THE UNITED STATES
NATIONAL BANK, PORTLAND, OREGON, a na-
tional banking association, and DAVID LLOYD
DAVIES, as Executors under the purported
will and testament of Maria C. Jackson,
deceased; THE UNITED STATES NATIONAL
BANK, PORTLAND, OREGON, a national banking
association, and DAVID LLOYD DAVIES and
WILLIAM W. KNIGHT, as purported Trustees
appointed by said purported last will and
testament; and BLACK WHITE FOUNDATION,
a corporation, *Appellees*.

OPENING BRIEF FOR APPELLANT.

I. STATEMENT OF JURISDICTION.

1. Jurisdiction of the District Court.

This is an appeal (R. 115-116; 121)¹ from a final judgment of dismissal, based upon the District Judge's

¹"R" refers to the printed Transcript of Record and the numerals which follow designate the page or pages.

view that the United States District Court had no jurisdiction over the subject matter, "but without any adjudication upon the merits of any of plaintiff's claims and without costs to or against any of the parties" (R. 112-115). The judgment was ordered on the basis of the first amended complaint and without other pleading or evidence.

The first amended complaint alleges that the appellant is a resident and citizen of California; that appellees are residents and citizens of Oregon, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00) (R. 55-56).² Accordingly, the District Court by virtue of Article III, Section 2(1) of the Constitution of the United States, and Title 28 of the United States Code, Section 1332, had jurisdiction of appellant's action.

2. Jurisdiction of the Court of Appeals.

The judgment of dismissal was signed on July 22, 1958, and filed on July 23, 1958. It was entered in the Civil Docket on July 22, 1958 (R. 114-115; 121). Appellant filed his notice of appeal on July 24, 1958. Sections 1291 and 1294 of Title 28 of the United States Code declare that this Court has jurisdiction of appeals taken from all final decisions made by said District Court. Rule 73(a) of the Federal Rules of Civil Procedure provides that the time within which an appeal may be taken shall be thirty (30) days from the entry of such judgment or decision, and that such an appeal may be taken by filing a notice of appeal in the District Court. Therefore, this Court has jurisdiction to review the judgment.

²The same allegations appear in the original complaint (R. 6-7).

II. STATEMENT OF THE CASE.

1. The Facts Alleged in the Amended Complaint.

The recital of facts which follows is based on the allegations of the first amended complaint.³

This action was brought by appellant, a minor citizen of California, approximately 14 years old, by his guardian *ad litem*, against the appellees herein, three citizens of the State of Oregon. Two of these are natural persons, and the third is a banking corporation (R. 55). Two of the appellees are sued individually and as purported executors of the purported last will and testament of Mrs. Maria C. Jackson, deceased, and all three are sued both individually and as purported trustees of a trust which is eventually to evolve into a foundation under the terms of the will. This will was executed on January 7, 1948, and was amended and supplemented by a series of codicils.

Mrs. Jackson died on February 3, 1956, and was at the time of her death domiciled in Oregon. Appellant is a great-grandson of Mrs. Jackson, and ever since 1953 has been her *only* surviving lineal descendant, next of kin and heir at law (R. 55-56).

Through this will, and its codicils, Mrs. Jackson bequeathed most of her estate (valued at approximately \$2,400,000.00) to a foundation. She left to appellant, her sole surviving lineal descendant, a bequest of One hundred fifty thousand dollars (\$150,000.00) to be held in trust.

³Where, as here, the action is dismissed for lack of jurisdiction, prior to the filing of a responsive pleading and before the taking of any evidence, the court accepts as true the allegations of the complaint. *Hills v. Eisenhower*, 256 F. 2d 609, 610 (9th Cir. 1958).

The particulars concerning this foundation and the will and codicils will appear later in this narrative.

Mrs. Jackson was the widow of Charles Samuel Jackson. Charles Samuel Jackson and Mrs. Jackson had two sons and no other children. These sons were Philip Ludwell Jackson and Francis Clopton Jackson. Philip Ludwell Jackson (hereinafter sometimes referred to as "Philip") had no issue. Francis Clopton Jackson had a son named Charles Samuel Jackson, Jr. Francis Clopton Jackson died in 1919 and, shortly thereafter, Mrs. Jackson duly and regularly adopted Charles Samuel Jackson, Jr., as her own son. Charles Samuel Jackson, Philip Ludwell Jackson, Francis Clopton Jackson, and Charles Samuel Jackson, Jr. predeceased Mrs. Jackson. Charles Samuel Jackson, Jr. left one child, Peter Crockett Jackson, who is the appellant herein (R. 57-58).

At the time of her death, Mrs. Jackson owned all or the majority of the stock of the Journal Publishing Company, a corporation. The Journal Publishing Company is, and was, the owner and publisher of the "Oregon Journal," a daily newspaper published in Portland, Oregon. The "Oregon Journal" was founded approximately 45 years ago and is, and has been for many years, a great and powerful newspaper. The stock of the Journal Publishing Company is by far the most valuable asset of Mrs. Jackson's estate. In the inventory and appraisal of the estate filed by the appellee executors, in the state probate court, the stock of the Journal Publishing Company is given a value in excess of One million five hundred thousand dollars (\$1,500,000.00) (R. 59).

The "Oregon Journal" was founded by Mrs. Jackson's husband, Charles Samuel Jackson, approximately 45 years ago. Charles Samuel Jackson during his lifetime was the publisher and director of the policies of the "Oregon Journal." Mrs. Jackson, during the lifetime of her husband and thereafter, took great pride in and had great affection for this newspaper. It was, therefore, her constant preoccupation and desire to perpetuate and keep control thereof within the Jackson family. During his lifetime, Charles Samuel Jackson owned all, or the great majority, of the stock of the Journal Publishing Company, which, on his death, went to his widow, Mrs. Jackson. She retained this stock until her death (R. 62).

Appellee David Lloyd Davies is a practicing attorney who was admitted to the bar of the State of Oregon in 1927. Mr. Davies was, at the time of Mrs. Jackson's death and for many years prior thereto, her personal attorney, as well as the attorney for the Journal Publishing Company and the Oregon Journal. As such attorney, Mr. Davies had full information and knowledge regarding the nature and value of her properties, including her stock in the Journal Publishing Company. Mrs. Jackson reposed great trust and confidence in Mr. Davies and had a very high regard for his legal and business ability. She therefore sought and followed his counsel in connection with important family and business matters. Mrs. Jackson likewise reposed great trust and confidence in her son, Philip, and also had high regard for his business ability. Accordingly, she sought and followed his counsel in connection with such family and business matters (R. 63). In making the will executed on January 7, 1948, Mrs.

Jackson sought and obtained the advice of Philip and Mr. Davies. Mr. Davies drafted the will and its codicils (R. 64).

At the time when this will was under discussion, Philip and appellant were the only surviving lineal descendants of Mrs. Jackson. Philip was then publisher of the "Oregon Journal" and over fifty years of age. He had never had any children. Accordingly, Mrs. Jackson desired by means of her will to provide generously for appellant, and to give him the right and opportunity to come into control of the newspaper as owner, publisher and editor. Philip and Mr. Davies were told by Mrs. Jackson of her desires with respect to appellant and were asked for their counsel and advice with regard thereto (R. 64).

At or about the time that Mrs. Jackson sought their advice, Mr. Davies and Philip determined that Mrs. Jackson would make a will under the terms of which appellant would receive nothing and whereby they would obtain control of her assets, including her stock holdings in the Journal Publishing Company. Pursuant to this determination, Philip and Mr. Davies represented to Mrs. Jackson that any disposition of her estate as she desired would result in an assessment of Federal estate taxes which could not be met without selling her shares in the Journal Publishing Company to outsiders who would then obtain control of the "Oregon Journal." Philip and Mr. Davies also represented to her that in order to preserve the "Oregon Journal" it would be necessary to avoid large estate taxes, and that this could be accomplished only by placing substantially all of her estate in a tax free foundation. These representations were then, as now, untrue

and known by Mr. Davies to be untrue. These representations were also either known to be untrue by Philip at that time, or were negligently made and without reasonable effort to ascertain whether they were true or false (R. 64-65).

These representations were then, as now, untrue because Mrs. Jackson's estate always had sufficient assets to pay the Federal estate taxes which would have been assessed had Mrs. Jackson made a will in accordance with her desires, without having to sell any of her stock holdings in the Journal Publishing Company (R. 65).

These representations were likewise untrue because the "Oregon Journal" could have been maintained and perpetuated as desired by Mrs. Jackson by leaving her share in the Journal Publishing Company, and no other property, to a tax free beneficiary. Mrs. Jackson, because of the great trust and confidence which she had in Philip and Mr. Davies, believed their representations and relied thereon (R. 65).

Philip and Mr. Davies, pursuant to said determination and by means of said representations, induced Mrs. Jackson to include a provision in her will, Article VI thereof,⁴ giving the entire income of her estate to Philip for life and the remainder to a foundation. They told Mrs. Jackson that the foundation would receive the remainder of her estate, free of estate taxes. (In this will no provision was made for appellant.) In order to accomplish this

⁴This statement is incomplete. Actually the complaint should have said, "Articles V and VI." The will, which is an exhibit to the complaint, shows that Article V provides the trust for Philip. Since Philip predeceased Mrs. Jackson, his trust is of no consequence on this appeal.

purpose, Philip and Mr. Davies utilized the trust and confidence which she reposed in them and her fear that the "Oregon Journal" would fall into the hands of strangers and out of the hands of the Jackson family. By so doing they were able to overcome her volition to the extent that, although she desired to provide for appellant, she nevertheless executed a will which reflected the purposes and desires of Philip and Mr. Davies and not her own (R. 66).

Philip had no desire to provide for anyone else out of his mother's estate. He had neither affection nor regard for appellant. By leaving the remainder interest to a supposedly tax free foundation, and thereby attempting to free the value of the remainder from taxes, Philip expected to and planned to receive the largest possible income for life by minimizing the Federal estate taxes, thereby preserving the maximum value for the corpus of the estate. As we have already stated in a footnote, Philip's death prior to the death of his mother thwarted this purpose.

Having set the method of disposing of the property of his mother, Philip acted in concert with Mr. Davies by means unknown to appellant, but well known to Mr. Davies, so that Mr. Davies drafted a will to accomplish their purposes (R. 66). In the will thus drafted and thereafter executed by Mrs. Jackson on January 7, 1948, there was included a clause whereby Mrs. Jackson disinherited appellant, who then was approximately five years of age (R. 67).⁵ This will was signed and witnessed in the form

⁵Article VIII of the Will (R. 83).

required by law, and Mrs. Jackson was of sound and disposing mind when she executed it (R. 56).

The foundation was so planned that at the death of Philip, Mr. Davies, the bank, and a person selected by Mr. Davies, would, as trustees, control the foundation, the "Oregon Journal", and the Journal Publishing Company. The Jackson fortune and the prestige of a great newspaper were and are now sources of power, influence and prestige. The trustees holding this fortune and this newspaper with plenary powers and without substantial supervision or interference would be able to place themselves in a place of leadership and social and financial power by virtue of this control. In addition, the position of trustee would be lucrative, yielding substantial fees for life. In addition, Mr. Davies would, either directly or through others, act as legal counsel for the foundation, with additional substantial emoluments (R. 67).

In February, 1950, Mrs. Jackson added a codicil to her will, the subject of which was a bequest to Stanford University. In a further codicil, executed on August 15, 1952, she revoked the bequest to Stanford, having made other provisions for the same purpose. In the codicils she ratified and confirmed all of the provisions of the will of January 7, 1948 (R. 84-87). On February 27, 1953, after the death of Philip, Mrs. Jackson added another codicil to her will. In this codicil she created a trust of one hundred fifty thousand dollars (\$150,000.00) for the benefit of appellant. The residue, comprising substantially all of her estate, was left to the foundation, as in the will of January 7, 1948. In this codicil Mr. Davies is named co-executor of the will. By means of this instru-

ment, Mrs. Jackson again ratified and confirmed the provisions of the will of January 7, 1948.

On July 8, 1953, Mrs. Jackson executed another codicil to her will. This codicil contains a provision whereby Mr. Davies would be one of a class of persons, *who under a certain set of circumstances would be able to buy the stock of the Journal Publishing Company at prices substantially lower than might be obtained if such stock were sold to persons not included in this class.*⁶ In this codicil Mrs. Jackson again ratified and confirmed the provisions of her will of January 7, 1948 (R. 95-98). All of these codicils were signed and witnessed in the form provided by law, and Mrs. Jackson was of sound and disposing mind when she executed them (R. 68).

At no time was it ever disclosed to Mrs. Jackson by any person that the representations which induced her to make this will were untrue, although it was the duty of Mr. Davies and also of Philip to do so. By this concealment, Mr. Davies was able, after the death of Philip, to induce Mrs. Jackson, contrary to her natural inclinations, so to amend said will of January 7, 1948, by means of said codicils of February 27, 1953, and July 8, 1953, as to preserve and greatly to enhance the privileges and emoluments which were provided for him in said will. By this concealment, Mr. Davies was also able to prevent Mrs. Jackson from making a will under the terms of which appellant would have gained control of the "Oregon Journal", and a substantial portion of the balance of Mrs. Jackson's estate (R. 68-69).

⁶All emphasis supplied by the writers, unless otherwise indicated.

All of the representations and influences which motivated, induced and caused the execution of the will of January 7, 1948, likewise induced, motivated and caused the republication of this will in the four codicils, in that nothing occurred to make Mrs. Jackson suspect or question the representations made to her, and Mr. Davies continued to be her trusted and confidential attorney (R 69).

At some time subsequent to 1953, Mrs. Jackson determined to make certain that her wishes as to appellant would be carried out, i.e., that he would come into control of the "Oregon Journal" and would also ultimately receive the bulk of her estate. She accomplished this by a will or codicil, a change in trust provisions, directions to trustees, or by some other means, all unknown to appellant. She made known to certain of her friends that she had completed such arrangement for appellant, but did not disclose the method whereby her purpose and desire had been accomplished. By such method the will and codicils above mentioned have been amended or revoked in such a manner that appellant would receive far in excess of the \$150,000.00 provided for him in the codicil of February 27, 1953. The manner or method whereby Mrs. Jackson accomplished her purpose is known to the appellees, but not to appellant (R. 69-70).

The will, with its codicils, was admitted to probate in the Circuit Court of Multnomah County, Oregon, on February 7, 1956, less than four days after Mrs. Jackson's death. It was admitted to probate *in "common form"*, *ex parte*, and *without notice to any person whomsoever*. The purported will, with its codicils, was admitted to

probate on petition of Mr. Davies and the appellee bank, who are named executors therein, and letters testamentary were issued to them on February 7, 1956. At the time that Mr. Davies applied for the admission to probate of said will and codicils he had knowledge of the method whereby Mrs. Jackson had accomplished her purpose and desires with respect to appellant (R. 56-57; 70).

Further facts to be considered in appraising the nature of the action brought and the relief sought by appellant will be found in certain express provisions of Article VI of the will, and the codicils which republish Article VI. These are the following:

1. There is created a perpetual trust to be known as the Jackson Foundation (R. 80).⁷ The trustees thereof are to be Mr. Davies, appellee bank, and a third individual *to be appointed by Mr. Davies*. By codicil Mr. Knight, an appellee, was appointed the third trustee (R. 92). In the event of the death of a trustee, the surviving human trustee and the president of appellee bank are to select a substitute trustee. Thus the trustees are self-perpetuating.

2. The net income of the trust is to be "distributed by Trustees for use within the State of Oregon for charitable, educational, or eleemosynary purposes and for the advancement of public welfare". It is provided that the "trustees shall have wide discretion in the selection of the particular purposes for which said distribution shall be made and shall select beneficiaries as they shall deem to be most appropriate and best calculated to promote

⁷It is solely this trust which is under attack. The rest of the will is conceded to be valid.

the welfare of the public of the City of Portland or the State of Oregon, or both” (R. 80).

3. The Trustees in any disposition of the stock of Journal Publishing Company shall “endeavour to do so in such a manner as to perpetuate the ‘Oregon Journal’,⁸ . . . as a newspaper which conforms generally to the standards of that newspaper since the founding thereof by my late husband . . . If it may be done without jeopardy to the standing of said newspaper, the trustees shall endeavour to give preference to persons actually in the employ of Journal Publishing Company and engaged in the publication and operation of the newspaper . . . I give to the trustees broad powers, to be exercised in their discretion, in accomplishing the purposes and policies expressed in this paragraph” (R. 80-81).

4. The trustees are given unlimited powers in the investment and reinvestment of the trust property. They may sell, exchange, mortgage or otherwise dispose of trust property as they see fit (R. 81-82).

5. The stock of the Journal Publishing Company shall not be used to pay debts, taxes or legacies unless the other assets of the estate (other than personal chattels) are exhausted (R. 82-83).

6. The trustees may retain the stock of the Journal Publishing Company as an investment even though it might form a substantial portion of the trust estate. If the trustees should ever consider it to be in the best interests of the “Oregon Journal” or in the best interests

⁸This provision of Article VI calling for the *perpetuation* of the “Oregon Journal” is unqualified, and is therefore mandatory.

of the trust estate to sell any of the stock, they should so do, but if possible the ownership and control of the Journal Publishing Company and the newspaper should be retained on a local basis, "*preferably in the hands of persons who are then in the actual employ of the Journal Publishing Company or who are associated with the management and operation of the paper.*" Then comes a provision which is most significant. Quoting from the codicil: "*I direct that in any disposition of such stock, the purpose herein stated shall be carried out even though the amount which may be realized may be very substantially less than might be obtained if such stock or the paper were to be sold in a different manner or to other purchasers. . . . I direct that any person or persons within the categories above specified who may also be at any given time an executor of my will, or trustee of any of the trusts created by my will . . . , shall be permitted and eligible to purchase stock at the same prices and on the same terms as my executors or trustees are willing to sell to others within such preferred categories of purchasers, even though such person or persons may be acting as such executor or trustee*" (R. 96-97).

The foregoing provisions of the will seem intended to create a charitable trust. However, this trust is most uncertain and indefinite as to its objects. The trust provisions also show with complete certitude that *the real objective of the testatrix is to perpetuate a newspaper business and to carry on such business through a purported, but not an actual charity.* They also show that *the major portion of Mrs. Jackson's estate in the untrammelled and absolute discretion of the trustees might*

be used for the financial benefit of a limited class of persons, including Mr. Davies (an executor and trustee) and Mr. Knight (a trustee) and not for charitable purposes. Moreover, as long as the trust lasts, the successor trustees, selected by surviving trustees, may acquire the Oregon Journal at any price.

These facts are the basis for six separately stated claims for relief, which are set forth in the first amended complaint. Only the facts material to each claim are respectively alleged.

2. The Relief Sought by Appellant.

Appellant seeks the following relief in his amended complaint:

First Claim for Relief.

To have adjudicated invalid the provisions of the will which create the trust, because the purposes of the purported charitable trust are so indefinite and uncertain that the same cannot be executed and carried out, and because the discretion accorded the trustees therein is so wide and indefinite that their consciences cannot be held to the carrying out of a definite and certain purpose under the supervision of a court of equity (R. 58).

Second Claim for Relief.

To have adjudicated invalid all the provisions of the will creating the trust for these reasons:

(a) The alleged charitable trust has for its purpose and achieves only the results of avoiding taxes and of creating a perpetual trust whereby a group of persons,

self-perpetuating by express provision, are vested with plenary powers to use the trust property, including the Journal Publishing Company and the newspaper owned and published by the Company for their personal profit and advantage, with charity as a secondary and subordinate incident (R. 60-61).

(b) Through the mandatory directions contained in the will with respect to the sale of the stock of the Journal Publishing Company or the "Oregon Journal," the major portion of the fortune bequeathed to the trust may, in the untrammelled discretion of the trustees, be used primarily for the financial benefit of a limited class of persons employed in the business of the Journal Publishing Company, *including the executors and trustees* and their successors, in effect appointed by themselves, and not for charitable purposes.⁹

Accordingly, the provisions of the trust are against the public policy of the State of Oregon and create a perpetuity in violation of law (R. 61-62).

Third Claim for Relief.

To have adjudicated that the will and codicils have been amended or revoked in such manner that appellant would have come into control of the "Oregon Journal" and would have received far in excess of the bequest provided for him in the codicil of February 27, 1953 if the documents involved had not been withheld, and to impress a trust for appellant's benefit on any money and property

⁹Such a trust is not charitable. See Restatement of Law of Trusts, vol. 2, sec. 376, p. 1166; *Benton County v. Allen*, 170 Ore. 481, 133 P. 2d 991 (1943).

which the trustees might receive pursuant to Article VI of the Will (R. 62-70).

Fourth Claim for Relief.

To have adjudicated invalid all the provisions of the will relating to the trust on the ground that they are the product of fraud on the part of Mr. Davies and Philip Jackson (R. 70-71).

Fifth Claim for Relief.

To have adjudicated invalid all the provisions of the will relating to the trust on the ground that they are the product of undue influence exercised by Mr. Davies and Philip Jackson on Mrs. Jackson (R. 71-72).¹⁰

Sixth Claim for Relief.

To have it adjudicated that as to all the property bequeathed to the trust, Mrs. Jackson died intestate, and directing respondents to take appropriate steps to have this property distributed to appellant through the state probate court as Mrs. Jackson's sole heir at law and next of kin (R. 72-74).

The only provisions of the will which appellant seeks to have the court adjudicate to be invalid are those creating the alleged charitable trust. He does not attack any

¹⁰A situation closely paralleling that alleged in the amended complaint was held to show undue influence in *Teter v. Spooner*, 279 Ill. 39, 116 N. E. 673 (1917) and *Ziegler v. Coffin*, 219 Ala. 586, 123 So. 22 (1929). Oregon cases uniformly hold that enrichment of the attorney who draws the will raises a presumption of undue influence. *Weeks v. O'Neill*, 165 Or. 575, 108 Pac. 2d 775 (1941); *Lyon v. Wilson*, 173 Or. 414, 145 Pac. 2d 808 (1944). See *infra*.

other provisions of the will on any ground. Appellant does not question the due execution of the will, nor does he contend that Mrs. Jackson was not fully competent to dispose of her estate by last will and testament (R. 56).

III. THE DECISIONS OF THE DISTRICT COURT.

1. The First Decision: Dismissal of the Original Complaint.

In appellant's original complaint (R. 6-20), there are set forth most of the facts which are alleged in the first amended complaint. In the original complaint plaintiff's claims were not separately stated. Appellees moved to dismiss the original complaint prior to the filing of a responsive pleading and before the taking of any evidence. This motion read as follows:

"The defendants move the court to dismiss this action *on the ground that the court lacks jurisdiction over the subject matter because the action is essentially a proceeding to contest a will* and therefore one within the exclusive jurisdiction of the state probate courts." (R. 24.)

The District Court granted the motion (R. 54), but not entirely on the ground urged by appellees. The District Court dismissed the action because it felt (erroneously, we submit) that since it did not have jurisdiction over the "*main*" controversy, presented by the complaint—the claims for relief based on fraud and undue influence—it should dismiss not only those claims for relief, but also *all* claims for relief. The latter claims, according to the District Court, were "*subsidiary*" (R. 50, 52) to those based on fraud and undue influence. Just why perfectly

good causes of action for equitable relief were subsidiary was never developed by the learned District Judge, either by reason or authority. We will amplify this thesis.

2. The Second Decision: Dismissal of the First Amended Complaint.

The order dismissing the original complaint provided, in part, that appellant "may amend this complaint if he is so advised" (R. 54). Pursuant to this provision of the order, appellant filed his First Amended Complaint.

Appellant's several claims were separately stated in the first amended complaint not only to correct an error in the form of the pleading to which the District Court had called attention in its opinion (R. 27),¹¹ but also for the purpose of showing the District Court that the claims for relief grounded on the invalidity and illegality of the trust and the revocation of the will were not "subsidiary" to the claims based on fraud and undue influence.

In due course the appellees moved to dismiss the first amended complaint on the *same ground* upon which they had moved to dismiss the original complaint, to wit, "that the court lacks jurisdiction over the subject matter because the action is essentially a proceeding to contest a will and therefore one within the exclusive jurisdiction of the state probate courts" (R. 112).

Pursuant to this motion, the District Court dismissed the first amended complaint on the same grounds and for the same reasons that it dismissed the original complaint. The order of dismissal reads, in part, as follows:

¹¹In its Memorandum, the District Court said, "plaintiff asserts at least four separate claims or causes of action, *but these are not separately stated*" (R. 27).

It appearing to the Court that the first amended complaint presents in substance nothing more than a rearrangement of the claims asserted in the original complaint (cf. *Stark v. Starr*, 94 U.S. 477, 485 (1876)), and that the motion to dismiss should be granted *upon the grounds and for the reasons stated upon the dismissal of the original complaint* (see *Jackson v. United States National Bank, Portland, Oregon*, 153 F. Supp. 104 (D. Ore. 1957)).

It is further ordered that defendant's motion to dismiss is hereby granted for want of federal equity jurisdiction over the subject matter; . . . (R. 112).

In short, the action was dismissed on the grounds and for the reasons stated in the Court's "Memorandum of Decision".

In order to ascertain what motivated the District Court's decision and what are the real issues on this appeal, we must turn to the District Court's memorandum. This is the first step in establishing the foundation for our specifications of error and our argument.

IV. SUMMARY OF THE COURT'S MEMORANDUM OF DECISION.

Here we will outline the opinion of the District Judge upon which he based his judgment of dismissal. On occasion, we will take the liberty of commenting on some parts of the opinion, in order that obvious errors may be brought to this Court's attention.

The Court first says that in order to determine whether this "diversity case can be counted among 'all civil actions' within the meaning of 28 U.S.C.A. Sec. 1332, it

is necessary to consider the nature of the relief sought" (R. 27). The Court concluded that the relief sought was set forth in "*at least four separate claims or causes of action, but these are not separately stated* (Fed. R. Civ. P. 10(b)) (p. 5.)" (R. 27). Rule 10(b) provides for separate statement to facilitate clear presentation. (Because we believed that the Court's mild criticism was well founded, we have separately stated our case in six separate claims for relief.)

The District Court then went on to list the various types of relief sought, as follows:

First, plaintiff seeks an adjudication that certain provisions of the Jackson will and codicils, which establish a testamentary trust, are invalid, because not the will of the testatrix, having been obtained by claimed acts of fraud and undue influence.

Second, plaintiff seeks a judgment declaring that, even if the trust provisions are the will of the testatrix, the testamentary trust is nonetheless invalid, because (a) the purpose of the trust is so indefinite and uncertain, and the powers of the trustees so broad and indefinite, that the trust cannot be enforced by a court of equity; and (b) the trust is perpetual in duration without being primarily charitable in character, and so is a perpetuity in violation of Oregon law.

Third, plaintiff seeks a judgment declaring that certain provisions of the will were amended or revoked by an alleged later, missing will or codicil; and

Fourth, a decree that as to all property not found by the court to have been disposed of by will, the testatrix died intestate, leaving plaintiff as her sole heir and next of kin (R. 27-28).

Thus the District Judge describes our separate causes of action substantially as they appear in the First Amended Complaint.

Having determined the relief sought, the Court concluded that this relief was *equitable in nature* (R. 28). Of this there can be no doubt. The next inquiry was whether the Court had “ ‘the power, that is, the jurisdiction to grant the relief prayed for’ ” (R. 29). The opinion then established as a major premise that the *equity* jurisdiction vested by Congress in the Federal Courts, when sitting in equity, was exclusively that which was exercised by the English Court of Chancery at the time (1789) when the American Colonies severed their political connections with England (R. 29). Next there was established as a minor premise the proposition that at the time of said severance, the “jurisdiction of the English High Court of Chancery did not embrace suits to set aside wills of either real or personal property, either because of fraud or undue influence upon the testator or because of the existence of a later will” (R. 29-30). On these premises, the Court drew the conclusion that it was without power, in the exercise of its equitable jurisdiction “to set aside a will or the probate thereof, or to administer upon the estate of decedents *in rem*” (R. 30-31).¹²

¹²Citing: *Sutton v. English*, 246 U.S. 199, 205, 62 L. Ed. 664 (1918); *Farrell v. O'Brien*, 199 U.S. 89, 110, 50 L. Ed. 101 (1905); *Broderick's Will*, 88 U.S. (21 Wall.) 503, 517, 520, 22 L. Ed. 599 (1874); *Markham v. Allen*, 326 U.S. 490, 494, 90 L. Ed. 256 (1946); *Ellis v. Davies*, 109 U.S. 485, 494, 27 L. Ed. 1006 (1883); *Gaines v. Chew*, 43 U.S. (2 How.) 619, 645, 11 L. Ed. 402 (1844). These cases will be considered *infra*.

Having reached this conclusion, the District Court goes on to show that the Federal District Courts will not as a matter of *comity*, proceed to judgment *in rem* or *quasi in rem*, particularly in cases involving decedents' estates, "if jurisdiction over the res has previously been acquired by and continues in a State Court; *but may proceed to judgment in personam adjudicating rights in the res and leaving the in personam judgment to bind as res adjudicata the court having jurisdiction of the res*" (citing cases)¹³ (R. 32-33). The principle of *comity*, says the Court, would prevent it from interfering with the Oregon Court's possession of Mrs. Jackson's estate (R. 33-34).

(May we point out that we have never sought to have the District Court take jurisdiction over the estate or in any manner or form to interfere with the due administration thereof by the Oregon probate court. We seek only *in personam* relief, which will determine the proper disposition, a disposition to be made by the Oregon courts.)

The District Court next holds that in addition to the limitations imposed by *comity*, there are other limiting factors in the exercise of its traditional equitable jurisdiction. It says that this jurisdiction "should be disavowed as to actions to which the State has closed its Courts"¹⁴ (R. 34).

¹³This is the rule upon which we rely. It is noteworthy that the learned District Judge does *not* cite in support of his statement the decision of this Court in *Blacker v. Thatcher*, 145 F.2d 255 (1944) (cert. denied). As to this case see *infra*.

¹⁴Citing: *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 89 L. Ed. 2079 (1945) (bar of state statutes of limitation); *Woods v. Interstate Realty Company*, 337 U.S. 535, 537, 93 L. Ed. 1524 (1949) (failure to comply with prerequisites to suit imposed by state statute); *Griffin v. McCoach*, 313 U.S. 498, 507, 85 L. Ed.

After having marked the areas within which its jurisdiction may not be exercised, the District Court points to other certain areas where this jurisdiction is not so limited. "Jurisdiction of the courts of the United States", says the Court, "cannot be impaired by the laws of the states" (R. 35). The Court then says:

The federal courts may entertain actions, within their diversity and historic-equity jurisdiction, involving claims to decedents' estates, "notwithstanding the fact that the laws of the State limit the right to establish such demands to a proceeding in the probate courts of the State. (Citing *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 227; 47 L. Ed. 147 (1902); *Griffith v. Bank of New York*, 147 F. 2d 899 (2d Cir.), cert. denied, 325 U. S. 874 (1945); *Blacker v. Thatcher*, 145 F. 2d 255-257; 9th Cir. 1944, cert. denied, 324 U. S. 848; 89 L. Ed. 1409 (1945)).

(In the *Security Trust* case, the Supreme Court held that a non-resident creditor could establish his claim against the estate of a decedent in a federal court action against the administrator, even though the state law limited the creditor to a proceeding in the probate court. In the *Griffith* case, a non-resident legatee was permitted to sue a testamentary trustee in the federal court to set aside a decree approving the trustee's account on the ground of fraud, notwithstanding a state law provision that such proceeding could be brought only in the Sur-

1481 (1941) (action based on contract violative of State's public policy); *Williams v. Minn. Mining & Mfg. Co.*, 14 F.R.D. 1, 9 (S.D. Cal. 1953) (Claim under California Workmen's Compensation Act). We have some difficulty in perceiving the application of these decisions to our case.

rogate's Court. In *Blacker v. Thatcher*, this Court upheld federal jurisdiction in a suit by a non-resident heir-at-law to have a clause in a will construed in order to prove intestacy. This Court so adjudged, despite the fact that under the applicable state law (Montana), such an action was deemed to be an *in rem* proceeding within the exclusive jurisdiction of the state probate court.^{14a})

Returning to the District Judge's opinion, he went on to show that any action *in personam* concerning estates of decedents would lie in the federal court, irrespective of the state law. On this subject, Judge Mathes said:

If, then, a right involving a decedent's estate is such as would have been enforceable in the English Court of Chancery in 1789 and is such as would be enforceable in an action in personam in some court—even a probate court of the state—a suit to enforce that right may be maintained in a federal court of equity as an action in personam if diversity of citizenship and the requisite jurisdictional amount exist (R. 35).¹⁵

(This is exactly what was said in this Court's opinion in *Richardson v. Green*, 61 Fed. 423 (1894); cert. denied, 159 U. S. 264, 40 L. Ed. 142 (1894) concerning which something will be said later in this part of our brief and much more will be said when we argue the subjects of undue influence and fraud.)

^{14a}*Blacker v. Thatcher* conclusively establishes that the District Court's decision was erroneous in all of its phases. For this reason a full discussion of the *Blacker* case is postponed to a later section of this brief.

¹⁵Citing: *Markham v. Allen*, 326 U.S. at 494, 90 L. Ed. 256 (1946); *Waterman v. Canal Louisiana Bank and Trust Co.*, 215 U.S. at 43, 54 L. Ed. 80 (1909); *Payne v. Hook*, 74 U.S. (7 Wall.) at 430, 19 L. Ed. 260 (1868); *Id.* 81 U.S. (14 Wall.) 252, 20 L. Ed. 887 (1871).

Then follows a statement which, to our minds, clearly upholds jurisdiction of all claims for relief in the amended complaint. Judge Mathes says:

On the other hand, if a right involving a decedent's estate is by state law made enforceable in an action in personam in a State court—rather than solely in rem in probate proceedings, a diversity suit to enforce the right in the federal courts is a “civil action” within 28 U.S.C. § 1332 (R. 36-37).

Next, the Court examines the applicable Oregon law for the purpose of determining whether that State grants to litigants, situated as appellant is, the privilege of seeking to set aside a will or its admission to probate “either upon the grounds of undue influence or fraud, or upon the ground that the will admitted to probate is not the last will” of the decedent in a plenary suit or action *in personam*. The Court concludes, after an exhaustive study of the applicable statutes and cases, that in Oregon there cannot now be a plenary suit *in personam* to revoke probate of a will, and that all such proceedings are *in rem* and within the exclusive jurisdiction of the Oregon probate court—a court of limited jurisdiction (R. 38-44).

(This conclusion, we submit, is erroneous. It is directly contrary to this Court's holding in *Richardson v. Green*, *supra*.)

Since we learned our procedure for the State of Oregon from *Richardson v. Green*, we heavily relied upon this decision in our briefs on the first motion to dismiss. The District Court therefore dissected *Richardson v. Green*, and determined that it was not controlling because (a) the portion of the opinion upon which we rely is said

to be *dictum*, and (b) because a statute passed in 1893 by the Oregon legislature, conferred exclusive jurisdiction of such actions upon the Oregon County Courts, acting as probate courts.

(It should be noted that, when *Richardson v. Green* arose, the Oregon County Courts *were the only courts* wherein actions to contest the validity of a will, or a part thereof, could be tried. Then, as now, County Courts were courts of limited jurisdiction, whether acting as probate courts or otherwise. However, as *Richardson v. Green* says, although these courts were of limited jurisdiction, they could entertain actions *in personam* in cases involving contests of wills.)¹⁶

The District Court having thus disposed of *Richardson v. Green*, held that it was without jurisdiction to declare invalid the portions of Mrs. Jackson's will which are alleged to be the product of fraud and undue influence. The District Court did hold, however, that appellant's claims for relief wherein he seeks to have construed and declared invalid the trust provisions of the will as being contrary to law and public policy of Oregon are "*within the historical scope of federal equity jurisdiction*" (R. 47-48). The Court also held that a portion of the original complaint, if viewed as a claim to impose a constructive trust on the ground of fraud on the part of the executor, allegedly perpetrated in petitioning for admission to probate of a prior will, while withholding a later and missing will, "may be construed" to fall within its equity juris-

¹⁶To avoid repetition we will discuss *Richardson v. Green* and the Oregon law fully in our argument concerning the fourth and fifth claims (fraud and undue influence).

diction. Finally, the Court decided that appellant's claim to all property as to which Mrs. Jackson might have died intestate, "also falls within the scope of federal equity jurisdiction to adjudicate *in personam* the validity and amount of the claims of heirs and others to estates in probate" (R. 48-49).

The District Court, after making these rulings, disavows and rejects jurisdiction over the very claims of appellant *which the Court holds to be within its equitable jurisdiction*. What possible basis was there for any such extraordinary denial of jurisdiction? The opinion tells us the learned Judge's reasoning in that behalf.

Judge Mathes first says that in one cause of action plaintiff seeks "this court's *construction* of the terms of the testamentary trust which plaintiff *alternatively* seeks to set aside as invalid for fraud and undue influence upon the testatrix" (R. 50). Then comes the Court's sole basis for refusing to try causes of action which are plainly, and are admitted by him to be, within his jurisdiction.

Being without jurisdiction over the issue as to the validity of the testamentary trust itself, this court does not, in the exercise of equity jurisdiction, reach the *alternative*, and in effect *subsidiary*, cause of action to construe the provisions of the trust (Id.).

(Assuming that the causes of action were alternative, the District Court would be compelled to take jurisdiction by reason of the provisions of rules 8(e) and 18(a). Obviously, the claims are not alternative because plaintiff could succeed in all six of his claims. The word "alternative" means a choice between two things "either of which may be chosen, but not both" (*Webster's New Interna-*

tional Dictionary). The word “subsidiary” means “supplementary,” “auxiliary,” “tributary,” “subordinate,” or “secondary” (*id.*). It must be obvious that all of our causes of action have equal dignity excepting the sixth cause of action, which is clearly auxiliary.)

Having thus been led into error, even in the meaning of words, the District Court goes even farther afield with the quotation of the maxim of equity that:

“A court of equity ought to do justice completely and not by halves.”

The Court applies this maxim to our case upon the theory that until the validity of the trust provisions have been adjudicated in the Probate Court of Oregon (i.e., whether the trust was the product of fraud or undue influence), the District Court “could not ‘do justice completely’” (R. 50-51).

The equitable maxim as to disposing of the whole controversy does not support the Court’s view. The maxim means that if a court of equity takes jurisdiction, it will dispose of the whole case if it can do so. It does not mean that if the Court has jurisdiction, it will dismiss the case because it is without jurisdiction of one or more phases of the case. The Court will no more dismiss such a case than it would do so because of inability to get jurisdiction over a necessary party (*Payne v. Hook*, 74 U.S. 425; 19 L. Ed. 260 (1869)). “Moreover, the doctrine is subject to important limitations and in its application care must be taken not to . . . deprive litigants of their *fundamental rights such as the right of . . . choice as between different forums*” (30 C.J.S. *Equity*, p. 419).

It may be, although it seems highly unlikely, that Judge Mathes meant to say that if the federal court retained the controversies over which it obviously had jurisdiction and rejected fraud and undue influence, then the Oregon Court might hold that appellant had lost his rights in that Court. In other words, if the federal court takes any jurisdiction at all, no other court will touch the case, irrespective of the federal court's rejection of jurisdiction as to a part of the case. We cannot believe that this is what the learned District Judge intended to hold. If it was, then it would only be necessary for him to glance at the many cases in which the federal court has taken jurisdiction of the patent phases of litigation, while rejecting phases which are not within its jurisdiction (see *infra*).

Again, returning to the Court's opinion, it is correctly said that the "fourth cause of action" (the sixth cause of action in the amended complaint) is secondary and auxiliary. Therefore, if the Court had no jurisdiction of *any* of the other causes of action, the auxiliary cause must fall (R. 51). The fourth (sixth) cause of action involves a claim for an adjudication of heirship in the event of partial intestacy. This is a truly subsidiary claim. The difference between a subsidiary claim and the primary claims of invalidity of the trust on five different grounds, all of equal dignity, must be obvious.

Next, Judge Mathes holds that the third cause of action (also the third cause of action in the amended complaint) asserts a claim to have declared a constructive trust based upon the existence of a later will or some other document which makes provision for the appellant. This, the

Court says, is “merely an incidental aspect of the whole controversy.” The Court admits that this is a claim of “suppression of a later, missing will or codicil.” (R. 52). This is precisely the case which was held to be within federal jurisdiction in *Gaines v. Chew*, 43 U.S. 619, 11 L. Ed. 402 (1844). How is it possible for a fraud upon the living (appellant), by means of suppressing a document, to be subsidiary or secondary to claims of fraud and undue influence practiced upon the dead (Mrs. Jackson)?

Finally, it is held that the “discretionary refusal” to refuse jurisdiction is made “in the light of plaintiff’s unquestioned and current right to seek in the proper probate court of the State of Oregon all the relief which he seeks here.” Suffice it to say that this remark, standing alone, would be a sound reason for the federal court to refuse jurisdiction in all diversity cases. All parties have entrée into the state Court.

Next comes a statement which is nothing less than amazing. The Court refers to “the high probability that if this Court were to retain jurisdiction of a part of the controversy under the circumstances, plaintiff might indeed confront a situation where the Oregon Court itself would refuse to do justice ‘by halves’.” (R. 52.)

(This flies directly in the face of every United States Supreme Court decision on the subject. The state Court must follow the final adjudication of the federal Court as to devolution of the estate. On this point, it is sufficient to quote from *Markham v. Allen*, 326 U. S. 490, 90 L. Ed. 256 (1946). This case went to the Supreme Court from this Circuit. In sustaining federal jurisdiction to deter-

mine the ownership of property in probate, the Supreme Court held that the federal Court may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state Court's possession *save to the extent that the state Court is bound by the judgment to recognize the right adjudicated by the federal Court* (Citing cases) (326 U. S. 494, 90 L. Ed. 260). See also: *Gaines v. Chew*, 43 U.S. 619, 11 L. Ed. 402 (1844); *Spencer v. Watkins*, 169 Fed. 379 (8th Cir. 1909); *Wood v. Paine*, 66 Fed. 807 (C.C.D. R. I. 1895), cited *infra*. The principle thus stated is so simple and so commonplace that we cannot understand how the District judge could reach a contrary conclusion.

And so on the basis of the reasoning which we have stated and briefly analyzed, the Court denied jurisdiction and dismissed the action.

V. ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

1. The District Court erred in dismissing the claims for relief which it held to be within its equitable jurisdiction.

2. The District Court erred in dismissing any of the claims for relief.

3. The District Court erred in dismissing the action as a whole.

4. The District Court erred in deciding that in Oregon a contest of a will on the grounds of fraud and undue influence is not an *inter partes* action in personam.

5. The District Court erred in deciding that the Ninth Circuit's decision in *Richardson v. Green*, supra, is dictum.

6. The District Court erred in deciding that the Ninth Circuit's decision in *Richardson v. Green*, supra, is no longer binding because of changes in Oregon law.

VI. OUTLINE OF ARGUMENT.

(A) The District Court erred in dismissing the claims for relief which were obviously and admittedly within its jurisdiction.

(1) The District Court had jurisdiction over the first, second, third and sixth claims for relief.

(2) Irrespective of the Federal Court's jurisdiction over the fourth and fifth claims, the dismissal of the first, second and third claims violated Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure.

(3) The District Court was led into error by mistakenly assuming that the attacks upon the trust were premature and by misunderstanding the nature and effect of equity's disinclination to do justice by halves.

(B) The attack upon Article VI of the will as amended by the codicils upon the grounds of fraud and undue influence are proceedings in personam under the law of Oregon. Therefore the Federal Court has jurisdiction of such proceedings.

(1) A Federal Court action contesting the validity of Article VI on grounds of fraud and undue

influence does not divest or interfere with the state Court's jurisdiction of the res.

- (2) If the state law permits a proceeding inter partes and in personam—even in a Probate court—to establish the invalidity of Article VI upon the grounds of fraud and undue influence, then the Federal Court will take jurisdiction of such action.
- (3) Under the law of Oregon an attack on a will is a proceeding in personam and inter partes.
- (4) The only case in any jurisdiction which has decided the question as to whether a will contest in Oregon is inter partes and in personam or in rem is *Richardson v. Green*. That case holds that a contest is inter partes. It is still law.

VII. ARGUMENT.

(A) THE DISTRICT COURT ERRED IN DISMISSING THE CLAIMS FOR RELIEF WHICH WERE OBVIOUSLY AND ADMITTEDLY WITHIN ITS JURISDICTION.

(Specifications of Error 1, 2, 3.)

The District Judge held in his opinion that he had jurisdiction over the claims for relief in the original complaint which are now the first, second and third claims for relief in the amended complaint. The first claim had for its object an adjudication of invalidity of the so-called trust (Article VI) upon the ground that it was indefinite and uncertain. The second claim was the attack upon the same Article upon the ground that personal profit was the primary purpose and charity the secondary purpose of the trust and that there was a specific provision

for financial benefit to a limited class of persons, including the executors and trustees. The third claim sought an adjudication that there was a later provision for the plaintiff so that a trust was impressed upon any money or property which the trustees might receive pursuant to Article VI.

It appears to us that the opinion also upholds the sixth claim, which seeks adjudication that as to all property bequeathed to the trust, Mrs. Jackson died intestate and requires the executors and trustees to take appropriate steps in the Oregon probate Court to have the property distributed to Peter Jackson. Of course, the sixth claim will not come into play unless Jackson succeeds in one of the other claims for relief. The sixth claim is thus ancillary to the other claims. It invokes, in effect, the use of the precise method whereby the federal Court will give the relief sought without interfering with the administration of the estate by the state probate Court (*Markham v. Allen*, *supra*).

So we may proceed upon the theory that the District Judge held that he had jurisdiction over the first, second, third and sixth claims for relief in the amended complaint. On the other hand, he held that he had no jurisdiction over the fourth and fifth claims upon the ground that one involved a charge of fraud and the other a charge of undue influence.¹⁷

Even assuming that the Court was right in its erroneous conclusion that it had no jurisdiction over the fourth and fifth claims, nevertheless it was error to dismiss the

¹⁷We will later show that the court had jurisdiction over the fourth and fifth claims as well as the first, second, third and sixth.

entire action. Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure direct that the Court retain the causes which are properly before it. The cases are to the same effect. The rules and the cases both say that if several claims for relief are joined in one complaint, and the Court has jurisdiction over one but not all of the claims, the Court may dismiss the claims over which it does not have jurisdiction, but must retain those over which it has jurisdiction. As the first step in our demonstration that the dismissal of Claims 1, 2, 3 and 6 violates these rules, we will show that these claims were within the District Court's jurisdiction.

(1) The District Court Had Jurisdiction Over the First, Second, Third and Sixth Claims for Relief.

(Specifications of Error 1, 2.)

That this statement is sound is established not only by the holding of the learned District Judge but also by the cases of *Gaines v. Chew*, 43 U.S. 619, 11 L. Ed. 402 (1844), *supra*; *Spencer v. Watkins*, 169 Fed. 379 (8th Cir. 1909), *supra*; *Wood v. Paine*, 66 Fed. 807 (C.C.D.R.I. 1895), *supra*, and by the decision of *this very Court* in *Blacker v. Thatcher*, 145 Fed. 255 (9th Cir. 1944), *supra*, all cited in the opinion. The opinion cites a number of other cases along the same line, but we limit ourselves to cases which consider situations substantially similar to the claims now under discussion (R. 47-51).

Spencer v. Watkins and *Wood v. Paine* decided that the District Court had jurisdiction over the first and second claims, viz.: actions to invalidate charitable bequests on the ground that they were void under state law. *Gaines v. Chew* decided that the District Court had jurisdiction

over our third claim, viz.: An action to have executors declared constructive trustees on the ground of fraud. The *Blacker* case goes even further. It holds that the District Court has jurisdiction over an action to determine *the construction or validity of a will*.

In the *Spencer* case, heirs at law sued to void a charitable bequest on the ground that it was invalid under the law of the state of decedent's domicile. Defendants contended that the Circuit Court was without jurisdiction, "because the suit was not at common law or in equity, within the meaning of the Constitution of the United States and the Judiciary Act, but, on the contrary, was of a probate character, and pertained to the administration of an estate of a deceased person, of which the local probate Court was invested with exclusive cognizance by the Constitution and statutes of the state." (169 Fed. 380, 381).¹⁸ The Circuit Court of Appeals decided to the contrary, holding:

"We think that a controversy like that before us is not one strictly pertaining to probate and administration, but, on the contrary, has every element of a *plenary suit inter partes*, and that it belongs to a class of which the English Courts of chancery were accustomed to take cognizance as involving the execution of trusts. 3 Pomeroy's Eq. Juris., Sec. 1127. *The suit of the heirs was not a will contest in the customary acceptance of that phrase.*" (382).

¹⁸In our case, the motion to dismiss all the claims was based on "the ground that the court lacks jurisdiction and the subject matter because the action is essentially a proceeding to contest a will *and therefore one within the exclusive jurisdiction of the state probate courts.*" (R. 112.)

Clearly, appellant's first and second claims for relief, wherein he seeks to void a charitable bequest, do not differ from the cause of action involved in the *Spencer* case.

In *Wood v. Paine* an heir at law sued to establish the invalidity of a bequest in trust to the town council of Coventry for the benefit of the poor of the town. In his bill, the heir asked that the bequest be declared null and void and that the executor be required to distribute to him his portion of that part of the estate which would otherwise go to the town council (66 Fed. 807-808). The Circuit Judge sustained his jurisdiction over the action, saying:

"The will having been established by authority competent for that purpose, there seems to be no doubt of the jurisdiction of this court to determine questions as to the *interpretation* thereof in this case, in which the complainant is a citizen of Michigan, and all the respondents are citizens of Rhode Island . . . Since the testator had his domicile in Rhode Island, and the land devised is situate in that state, it follows that the *validity* of the devise which is here brought in question is to be determined by the law of the state of Rhode Island." (66 Fed. 808, 809).

Again we have the same situation as our first and second claims for relief.

Gaines v. Chew clearly shows that Judge Mathes also was correct when he held that he had jurisdiction over what is now the third claim for relief. Plaintiff's bill alleged the following: Clark had executed two wills. One

of these was executed in 1811, and the other in 1813. In the earlier will, Clark left all of his estate to his mother, and in the later will he left all of his estate to his daughter. Upon the death of Clark, the executors suppressed the will of 1813, and probated the earlier will in the Louisiana Probate Court. The bill in the federal Court asked that effect be given to the will of 1813 and that the probated will of 1811 be revoked, and that the defendants be required to account (43 U.S. 627; 11 L. Ed. 405).

On appeal, the Supreme Court first held that the federal Court could not exercise jurisdiction to revoke the probate of one will and to probate another. This was because the power to do so was vested exclusively in the state Probate Court. However, the Court held that because of the fraud committed, it had jurisdiction to grant relief by declaring the executors to be trustees for the benefit of plaintiffs with respect to any property which belonged to the Clark estate (43 U.S. 644-650; 11 L.Ed. 412-416). This is exactly the same as the relief sought in our third claim.

The following excerpt from the opinion outlines the reasoning underlying the Supreme Court's decision:

In prosecuting their right as heirs at law by the complainants, *no probate of the will of 1813 will be required*. The complainants must rest upon the heirship of said Myra, the fraud charged against the executors, *in setting up and proving the will of 1811*, and notice of such fraud by the purchasers. In this form of proceeding the will of 1811 is brought before the court collaterally. *It is not an action of nullity, but a proceeding which may enable the court to give the proper*

relief, without decreeing the revocation of the will.
(43 U.S. 647; 11 L. Ed. 413)¹⁹

Blacker v. Thatcher, is a fairly recent decision of this Court in which three highly regarded jurists participated. Judge Healy wrote the opinion and former Chief Judges Denman and Stephens concurred. This case and *Richardson v. Green*, supra and infra, are the only decisions in this Circuit which directly bear on the problem presented here. We therefore feel justified in giving unusually elaborate consideration to the *Blacker* case.

The plaintiff was a citizen of Oregon and the heir at law of a Montana testator. The defendants, citizens of Montana, were respectively the executor and a legatee named in the will. The will had been admitted to probate in the Montana Probate Court and the estate was in the process of being administered therein. The plaintiff's complaint alleged that the legatee was not an heir of the testator and that the testator had died intestate as to the residue of his estate. The complaint also alleged that there was a controversy between plaintiff and defendants as to the construction of the will. The defendants in their answer moved to dismiss on the ground that under Montana law, jurisdiction of such a controversy resided exclusively in the Courts of the State of Montana. The District Court ruled that it had jurisdiction over the controversy and that the decedent had died intestate with respect to the residue of his estate (145 F.2d 256).

¹⁹The point was considered in *Markham v. Allen*, supra. There this Court was *reversed* by the Supreme Court for holding that the District Court had no jurisdiction.

After reciting the facts above summarized, this Court held that the laws of Montana like those of most of the states, "including practically all of those in the West...²⁰ provide a comprehensive system of probate." Judge Healy points out that where there is a will, proceedings start with the petition for probate and terminate with the decree of final distribution and that decree is conclusive. In Montana, says the Court, the probate proceeding embraces "the contest of wills and necessarily it comprehends the interpretation of the latter. The proceeding is in the nature of a proceeding in rem" (pp. 256-7). The Court goes on to say that under such circumstances the acceptance of jurisdiction by the Federal Court seems to interfere with the spirit of comity between Courts of independent and coordinate jurisdictions. In fact, says the Court both in the body of the opinion and by footnote, in states which have comprehensive systems of probate, such as Montana, proceedings to construe a will are generally held in Probate Courts and not in the exercise of general equity jurisdiction. But says the footnote, quoting from Pomeroy's Equity Jurisprudence, 5th Edition (1941) Secs. 346-352, this limited jurisdiction; i.e., jurisdiction in equity and not in probate, is exercised "only for the purpose of granting remedies which will serve to aid or remove obstacles from a pending administration." It is exercised "to construe doubtful provisions of a will and to direct executors with respect to

²⁰In our discussion of the fraud and undue influence claims, we will establish that the comprehensive system of probate found in Montana is also the system used in every state in this Circuit (prior to the admission of Alaska to statehood) *except Oregon*. Hence, *Richardson v. Green*.

their duties when a trust is created by it, but there is no special equitable jurisdiction to interpret a will . . . which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations . . .” (145 F.2d 257).

Judge Healy apparently approached the *Blacker* case very much as Judge Mathes approached this case. Judge Healy confessed his hesitancy in holding that a federal Court could take jurisdiction in what is essentially a probate matter. However, in contrast to the learned trial Judge, he held that he was bound by the decisions of the United States Supreme Court, and acted accordingly. He said that irrespective of a disinclination of the lower federal Courts to interfere in any phase of a probate proceeding “the Supreme Court has adhered to a different concept” (p. 257). He quotes at length from *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 54 L. Ed. 80 (1909). We will not further enlarge this brief by a complete quotation, but we do think that the last sentence in the *Waterman* case as quoted by Judge Healy deserves a place in this argument. We quote as follows:

This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them. (145 F. 2d 258)

The opinion then says, as we have consistently admitted, that the federal Courts cannot “seize or control property in the possession of the State court.” Also, as we have conceded, “In states where the probate proceeding is

purely one in rem and not a suit inter partes, sustainable in a court of equity, they cannot entertain jurisdiction over a bill to set aside the probate of a will.”

However, says the opinion,

the Supreme Court “appears broadly to have insisted upon the proposition that jurisdiction” in diversity cases “cannot be impaired by state laws prescribing the modes of redress in their courts or regulating the distribution of their judicial power.” (Citing cases) (145 F. 2d 258)

Then quoting from *Gaines v. Fuentes*, 92 U.S. 10, 22, 23 L. Ed. 524 (1875), the Court said:

... whenever a controversy in a suit between parties arises “respecting *the validity or construction* of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.” (Id.)

The next quotation is from *Byers v. McAuley*, 149 U.S. 620, 37 L. Ed. 867 (1892). This reads:

... where no adjudication has as yet been made as to who are distributees of an estate in process of administration, the federal court is entitled to “entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate.” *The pertinent decisions of the Court leave no room for the belief that the federal courts, on principles of comity, have any discretion to exercise in respect of the entertainment of suits of this nature.* (Id.)

The italicized sentence would seem to dispose of the District Judge’s view that he had any discretion to exer-

cise when he determined whether he would or would not retain jurisdiction.

Finally, this Court in the *Blacker* opinion completely disposes of Judge Mathes' apparent suggestion that the Oregon State Court may not follow the judgment of the Federal Court in order to avoid "justice by halves." It says:

But the presumption has been indulged that probate courts will respect adjudications made in settling the rights of parties in suits in the courts of the United States. (*Waterman v. Canal-Louisiana Bank Co.*, supra, 215 U.S. page 46, 30 S. Ct. 13, 54 L. Ed. 80.) It is there said that "a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected" in the Supreme Court. (p. 258)

Thus, it appears that this Court has clearly and definitely held that the first, second and third claims of the amended complaint, whether they involve validity, construction, or interpretation, are within the jurisdiction of the federal Court. We conclude that appellant's first three claims for relief (and the subsidiary sixth claim) are within the equitable jurisdiction of the United States Courts.

- (2) **Irrespective of the Federal Court's Jurisdiction Over the Fourth and Fifth Claims, the Dismissal of the First, Second and Third Claims Violated Rules 8(e) and 18(a) of the Federal Rules of Civil Procedure.**

(Specifications of Error 1, 2.)

The District Judge has characterized these claims as "separate claims or causes of action." (R. 27). This

statement is obviously sound. Under the authority of rules 8(e) and 18(a) appellant joined his three equitable claims with the fourth and fifth (fraud and undue influence) claims over which the District Judge decided that he had no jurisdiction. Having established that, our first three claims are cognizable in the federal Court and that there is jurisdiction of the sixth claim if there is jurisdiction of any of the other claims, it must now be determined whether the joinder of other claims over which the Court *may* not have jurisdiction prejudices the right of a non-resident litigant to press his equitable rights in the United States Court. Or to put the question in another way: Is appellant forced to dismiss claims which he thinks are properly presented to the federal Court (whether he is right or wrong), in order to maintain his position in the Court which the Constitution and the statutes provide as a proper forum? We submit that this cannot be so, despite the decision of the District Judge to the contrary. At worst, the joinder of the claims based on fraud and undue influence constitutes a misjoinder of causes of action. Under rules 8(e) and 18(a), as interpreted by the Courts, a litigant may so misjoin without having the entire action dismissed. These rules are mere reaffirmations of earlier rules established by Court rule and judicial decision. Former Equity Rule 26 provided in part:

The plaintiff may join in one bill as many causes of action cognizable in equity, as he may have against the defendant.

In *Gaines v. Chew*, *supra*, plaintiff joined a cause of action to revoke probate of a fraudulent will with a cause of action to require the executors to account. This

was a misjoinder, because the Louisiana probate Court had exclusive jurisdiction of the cause of action to revoke probate. The Supreme Court, however, instead of ruling that the suit should be dismissed, declared that while the Circuit Court could not revoke probate of the will, because jurisdiction so to do was vested exclusively in the state probate Court, it could grant the relief which was within its power to bestow, to-wit: an adjudication that the executors were constructive trustees of the estate for the benefit of plaintiffs.

Waterman v. Canal-Louisiana Bank & Trust Co., supra, is perhaps even more persuasive than *Gaines v. Chew*. In *Waterman*, the plaintiff sought the following judgment:

- (1) That a legacy to an institution lapsed because of uncertainty or non-existence of the legatee.
- (2) That heirs at law had abandoned any interest in the lapsed legacy.
- (3) That the plaintiff, as sole heir at law capable of inheriting, was the only person entitled to the lapsed legacy.
- (4) That another institution named in the will was not charitable and therefore not entitled to distribution.
- (5) For an accounting from the executors (215 U. S. 41-43, 54 L. Ed. 83-84).

The defendants argued that the Federal Court had no jurisdiction. The Circuit Court of Appeals ordered that the action be dismissed, and the Supreme Court reversed. These are some of the material parts of the Supreme Court's decision:

The United States circuit court, by granting this relief, *need not interfere with the ordinary settlement of the estate*, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to, determine as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. *The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court. . . .*

The circuit court in this case construed the bill, in view of its broad prayer for relief, *as one which undertook to take the entire settlement of the estate from the hands of the probate court*, and denied the jurisdiction of the circuit court of the United States in the premises. We are of opinion that to the extent stated, the bill set up a valid ground for relief; *and, while all that it asks cannot be granted*, enough was stated in it to make a case with the jurisdiction of the Federal Courts within the principles we have stated. (215 U. S. 46-47, 54 L. Ed. 85.)

Here the District Court dismissed all claims, including those over which it had jurisdiction. It thus failed to follow the ordinary procedure in the United States equity courts. It also violated Rules 8(e) and 18(a). These rules read as follows:

A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. *When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made*

insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both . . . (Rule 8(e)(2).)

The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim *may* join either as *independent* or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. (Rule 18 (a).)

These rules not only authorize joinder; they forbid any such drastic penalty as the dismissal of the action, because of misjoinder. They say that the course which the District Court should have pursued (if it was correct as to the claims based on fraud and undue influence) was to retain jurisdiction over all the claims, except the fourth and fifth.

This statement is clearly supported by *Hanna v. Britson Mfg. Co.*, 62 F.2d 139 (8th Cir. 1933). There, a cause of action to vacate an adjudication of bankruptcy was joined with a cause of action to vacate an equity decree. Defendants moved to dismiss the action upon the ground, among others, that a court of equity had no jurisdiction in bankruptcy, just as Judge Mathes held that a court of equity had no jurisdiction in probate. The District Court dismissed the action, just as Judge Mathes dismissed this action. On appeal, the Circuit Court held that the District Court had no jurisdiction in bankruptcy. The Circuit Court of Appeals reversed the judgment dismissing the action, holding that the District Court should have

retained jurisdiction of the action to vacate the equity decree. The Court said:

Our conclusion is that a cause of action to vacate an adjudication in bankruptcy may not be joined with a cause of action to vacate an equity decree.

It does not follow, however, that the court below was justified in dismissing the entire bill of complaint.

Equity rule 26 (28 USCA Sec. 723) provides: "The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant . . . If it appear that any such causes of action cannot be conveniently disposed of together, the court may order separate trials."

Thus Rule 26 itself impliedly directs a court of equity to dispose of any cause of action stated in the bill which can properly be disposed of . . . *if two causes of action are joined, of only one of which the court has jurisdiction, it may not dismiss both, but may only dismiss the one that it has no jurisdiction to try . . .*

The rule itself prohibits the joining of any causes of action unless "cognizable in equity."

That the proper course to be followed where a cause of action in equity as to which the court has jurisdiction is joined with a cause of action over which it has no jurisdiction is to dismiss *only* the latter cause of action is indicated, not only by the equity rule itself, but by the following cases: (Citing nine cases) (p. 147).

The rule is mandatory; there was no room for the exercise of discretion.

In the cases cited by the Court in the *Bricton* case, one or more of the causes of action arose under the pat-

ent laws, and the Courts had jurisdiction by reason of patent law, not by reason of the diversity of citizenship. These causes were joined in the suits with other claims over which the Courts did not have jurisdiction, and this resulted in a misjoinder of causes. Despite this misjoinder, it was held that while the Court was compelled to dismiss the cases over which it had no jurisdiction, it was, nevertheless, required to retain and adjudicate those over which it had jurisdiction. These cases all show that there are circumstances under which the equity rule, authorizing and encouraging joinder of causes has to be subordinated to the statute delineating the jurisdiction of the United States Courts.

The simplest approach applied to patent cases is found in *Mecky v. Grabowski*, 177 Fed. 591 (C. C. E. D. Pa. 1910). There a count for patent infringement was joined with a count for unfair competition. Both arose in connection with the same patented article. The Circuit Judge held that the unfair competition count was not within his jurisdiction because there was no diversity of citizenship. He held that the patent count was within his jurisdiction because it involved Federal patent laws. He adopted the simple process of sustaining a demurrer to the unfair competition count and retaining the patent count.

The best discussion of the principle of these cases which we have found, is in *Geneva Furniture Mfg. Co. v. Karpen*, 238 U. S. 254, 59 L. Ed. 1295 (1915). There the complaint included several causes of action, some arising under patent laws and others by reason of breaches of contract. One of the defendants was a corporation which did not reside in the judicial district wherein the action

was brought. It therefore could not be sued for breach of contract in that district without its consent. It could be sued there for patent violations. The Supreme Court held:

. . .; and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. *Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute.* Thus, the West Virginia company's objection, *while not good as to the entire bill, was good as to the causes of action not arising under the patent laws.* (238 U.S. 259-260; 59 L. Ed. 1297.)

Thus it clearly appears that even assuming that the fraud and undue influence claims do not belong in the Federal Court, nevertheless, there was no possible justification for the District Court dismissing the other counts. These, according to the District Judge himself, and according to all of the applicable authority which we have been able to find, were plainly and clearly within the jurisdiction of the Federal Courts and should remain there.

(3) The District Court Was Led Into Error by Mistakenly Assuming That the Attacks Upon the Trust Were Premature and by Misunderstanding the Nature and Effect of Equity's Disinclination to Do Justice by Halves.

(Specifications of Error 2, 3.)

A judge as able as the District Judge who decided this case is not easily led into what appears to be an

obvious misunderstanding of applicable principles of procedural law. There may be an explanation. In the first place, it should be noted that in the briefs which were written on the motion to dismiss the original complaint, neither side of this case argued the point of dismissal of the entire case in any detail. Appellees merely moved to dismiss the whole case because it was in essence a will contest. Appellant did argue that the attacks upon the trust provisions on grounds other than fraud and undue influence did not constitute a contest "in the customary acceptance of that phrase." (E.g. *Spencer v. Watkins*, 169 Fed. 379, *supra*.) Frankly, it did not occur to us that Judge Mathes would dismiss the entire case. Thus, his decision on the original complaint was, in a large measure, based upon an opinion reached without the aid of counsel.

The error in dismissing the whole case was elaborately argued in the brief in support of the First Amended Complaint. However, the judge was content to say that "The First Amended Complaint presents in substance nothing more than a re-arrangement of the claims asserted in the original Complaint." (R. 112.) On this ground and apparently without further consideration of the error in dismissing the complaint as a whole, the judgment was given.

We have already stated and disposed of the District Court's idea that plaintiff's causes of action are alternative. Actually, each one (other than sixth) is a separate basis for a judgment that the trust is invalid. Each one of the first five is effective without regard to the others. After the District Judge erroneously characterizes

the several claims as alternative, he sums up his holding that our present first and second claims should be dismissed in the following language:

Until validity of the testamentary trust provisions has been finally adjudicated in the Probate Court of Oregon (O.R.S. 115.180), this court "could not do justice completely", and instead would be compelled to do justice "by halves", which, in equity, it will not do (R. 51).

This is a statement that until the fraud and undue influence claims are decided in the State Court, the other claims are premature. They are not premature, because they ask the Federal Court to tell the State Court that the trust provisions are void as a matter of law. Should they succeed, the State Court, while still administering the estate in the pending proceeding, will be compelled to distribute the residue disposed of in Article VI, to the sole heir at law because of intestacy. Wherein is this process premature?

Perhaps the best way to show what is and what is not premature is to refer to the cases which Judge Mathes cites to support his ruling. We have already discussed three of these cases, viz. *Waterman v. Canal-Louisiana Bank & Trust Co.*, supra; *Spencer v. Watkins*, supra, and *Wood v. Paine*, supra. None of these even touches upon the subject of prematurity.

The district Judge cites two cases which do discuss the subject of prematurity and which clearly demonstrate that the subject is not even material to the case at bar. One case is *Walker v. First Trust & Savings Bank*, 12 F. 2d 896 (8th Cir. 1926). There the bank was trustee

of a testamentary trust. It brought suit in the federal Court asking for instructions as to the method of handling trust funds. Among the instructions requested was an answer to the following question: "In the event of the death of . . . Brittain during the existence of the trust leaving issue, is the child of . . . Brittain entitled to receive the sum of \$400.00 per month?" This is what the Court held:

Brittain . . . is still living . . . about 51 years of age. One child of his . . . is also living. It is quite possible that other children may be born . . . during the existence of the trust. The question asked by the trustee is therefore *speculative*, and may involve the rights of persons not *in esse*; the instruction asked is not necessary for the present guidance of the trustee.

As a general rule, a court of equity "will not undertake, *where there is no matter in dispute, to declare future rights*, nor will it ever undertake to decide upon and determine contingencies which may never arise. . . ." (p. 903.)

The other case cited on the subject of prematurity is *Gebhard v. Lenox Library*, 74 N.H. 416, 68 Atl. 540 (1907). In this case an executrix asked for construction of a will and for instructions concerning her duties. When the bill was filed there was pending and undetermined a petition for re-examination of the probate of the will which, if successful, would divest the executrix of title. The Court dismissed the bill upon the theory that there was no reason for the executrix to ask any questions until it was determined whether she had any rights whatsoever. The Court said:

The court is therefore asked to construe the provisions of a document purporting to dispose of the property of the deceased while proceedings are pending which may show that its execution was invalid and that the plaintiff has no title to the estate as executrix and no trust duties to perform. It does not appear that the advice sought will be of use to the plaintiff in the discharge of official duties. In such a case the court will decline to comply with the request for instructions (pp. 540-541).

In this case, both proceedings were in the same state court.

Our case is the same as the "proceedings which are pending," as described in the *Gebhard* case. In our case all of the proceedings are in one action; the establishment of any one of the first five claims will result in invalidating Article VI and in disposing of the entire case. We do not have the situation of an attack on the will, so that a determination as to one clause (Article VI) is not premature. The amended complaint clearly says, "All other parts of said will are valid." (R. 71, 72, 73.) Since all claims are in the same action, none is premature. There is no reason to assume that the issue of fraud and undue influence should be tried before the issue of invalidity of the trust on other grounds. It would probably be more convenient to adopt the contrary procedure, i.e. to try legal issues before factual issues.

In short, every cause of action alleged in the amended complaint, other than the sixth, presents a presently existing justiciable controversy upon various separate and distinct grounds. We repeat, they are all of equal dignity. No one is dependent upon the other. A judgment adverse

to Appellant on any of the issues presented by any one of the claims is *res judicata* on that subject. The fundamental error in the decision is that the District Judge decided that two forms of attack on the trust (fraud and undue influence) must be pursued in advance of the attack upon other grounds. We cannot find any basis for this view.

The second error which resulted in the dismissal of the admittedly proper claims was the District Judge's application of the principle "A court of equity ought to do justice completely, and not by halves" (R. 50). Properly understood, this means that a court of equity will do justice as completely as it can. If one controversy is not within the jurisdiction of the Court because of lack of jurisdiction of parties or lack of jurisdiction of subject matter, it is impossible to do justice completely. This does not mean that the case may be dismissed, although the opinion of the District Judge seems to hold that he had discretion to do so.

We respectfully submit that the principle of full justice does not mean that a citizen of a foreign state, who is entitled to the protection of the federal Courts, is deprived of that protection because some phase of his case may be exclusively in the jurisdiction of the state Courts. It would certainly deprive appellant of his fundamental right to choose "as between different forums" (30 C.J.S. *Equity*, 419, *supra*).

In order to demonstrate the error, we will again explore the decisions upon which the District Judge relied. They are: *Camp v. Boyd*, 229 U.S. 530, 551, 57 L. Ed. 1317, 1327 (1913); *United States v. Union Pacific Railway*,

160 U.S. 1, 50, 51, 40 L. Ed. 319 (1895); *Waterman v. Canal-Louisiana Bank & Trust Co.*, supra; *Walker v. First Federal Trust & Savings Bank*, supra; *Spencer v. Watkins*, supra; *Wood v. Paine*, supra; *Gebhard v. Lenox Library*, supra.

We have already discussed the holdings in *Walker v. First Trust and Savings Bank*, *Spencer v. Watkins*, *Wood v. Paine* and *Gebhard v. Lenox Library* in this part of our brief. None of them have anything to do with the subject of equity *insisting* upon taking the whole case or none. In fact, none of them actually relies upon the principle of not doing justice “by halves.” *Camp v. Boyd* and *United States v. Union Pacific Railway* both announce the principle and follow it because it presented no difficulty. In these cases, all of the controversies were properly within the jurisdiction of the Federal Court and were therefore brought into one case.

We have discussed *Waterman v. Canal-Louisiana Bank & Trust Co.* more than once. It is therefore unnecessary to go into great detail. Suffice it to say that in *Waterman* five separate and distinct judgments were asked. Some were outside of the jurisdiction of a Federal Court because they were peculiarly matters of probate, such as that part of the *Waterman* case which involved an accounting by the executors. Nevertheless the Supreme Court held that *all relief which was within federal jurisdiction should be granted by the Federal Court*. It did not order a dismissal of the entire case. In fact, it reversed a Circuit Court’s decision dismissing the bill. It was not worried about doing justice by halves, because that rule is “not an inflexible one” (30 C.J.S. *Equity*, p. 419).

Another error which perhaps is chargeable to the failure of counsel to discuss the matter in their briefs was the District Judge's dismissal of what is now the third claim for relief. This is concerned with an alleged undisclosed and later will or other document. It seeks judgment that the defendant trustees be held constructive trustees for appellant's benefit because of fraudulent suppression. This is the remedy allowed in *Gaines v. Chew*, supra. The District Judge himself held that this cause was within the jurisdiction of a federal Court of equity (R. 48). Why then did the District Judge dismiss the claim?

Because, he says, "A claim to have declared a constructive trust . . . is not the main purpose of this action but merely an incidental aspect of the whole controversy . . . and a subsidiary claim of fraud upon the probate court of Oregon" (R. 52). With the utmost deference to the District Judge this is clear *ipse dixit*. Just why it is "incidental" or "subsidiary" we are not told because it is neither one or the other. It is based upon facts entirely different from the facts stated elsewhere. It is based upon the fraudulent suppressing of a later document and seeks entirely different relief, viz: a declaration of the existence of a trust based upon that fraud.

Again it is necessary for us to analyze the cases cited by the Judge in support of this alleged "incidental aspect" and "subsidiary claim." The cases are: *Ellis v. Davis*, 109 U.S. 485, 27 L. Ed. 1006 (1883); *Haynes v. Carpenter*, 91 U.S. 254, 23 L. Ed. 345 (1876); and *Broderrick's Will (Kieley v. McGlynn)*, 88 U.S. 503, 22 L. Ed. 599 (1875).

Ellis v. Davis was an action by heirs against an executor for an accounting; to revoke the probate of a will upon the grounds of unsoundness of mind and undue influence, and to set aside a sale of property from the decedent to the defendant. At the time of this decision the distinction between equity and law was strictly maintained. As to that part of the bill in equity which was concerned with possession of the real property and the accounting it was held there was an adequate remedy at law so that these causes of action would not be entertained in equity. As to the attempt to invalidate the will and annul its probate, it was held that federal Courts of equity do not administer relief in such cases.²¹ As to the fraud in the sale of the property the Court held that the allegations were insufficient to allege fraud. For these reasons it was held that the demurrer was "rightly sustained."

In *Haynes v. Carpenter*, *supra*, the object of the suit was "to enjoin and stop litigation in the state courts and to bring all litigation before the Circuit Court." By virtue of the federal statute prohibiting federal Courts from granting injunctions to stay proceedings in a state Court (Act of March 2, 1792, 1 Stat. at L. 335) the Supreme Court held that there was no basis for the action.

²¹The case recognizes that where the laws of the state provide "for trying the question of the validity of a will already admitted to probate by a litigation between parties, . . . it may be that the courts of the United States have jurisdiction." (109 U.S. 496; 27 L. Ed. 1009.) This is material to the fourth and fifth claims.

In the famous case of *Broderick's Will*, the Supreme Court held that in California,²² where there are elaborate provisions for the admission of wills to probate after due notice and for contest thereof under special probate procedure providing for special notice, the federal Courts will not take jurisdiction of an action to revoke the probate of a will. The Court applied this principle to an attempt via a suit in equity to revoke probate of an alleged forged will, which had been admitted to probate. The Court took pains to point out that the California procedure did not permit such an action *inter partes*.

We confess our inability to perceive the authority of these cases to support the view that an action brought pursuant to the rule of *Gaines v. Chew* is incidental or subsidiary. It was not held subsidiary or incidental by the Supreme Court in *Gaines*—nor in any case, so far as we are advised.

So much for the District Court's error in dismissing the whole case, because he denied jurisdiction of the attack on Article VI on the ground of fraud and undue influence. We will now present our arguments to support the proposition that the Court had jurisdiction of these claims.

²²The difference between California and Oregon is best brought out in *Richardson v. Green*, *supra* and *infra*, and *Carrau v. O'Calligan*, 125 Fed. 657 (9th Cir. 1903), and decision affirming the *Carrau* case *sub. nom. O'Callaghan v. O'Brien*, 199 U.S. 89, 50 L. Ed. 101 (1905), *infra*.

(B) THE ATTACK UPON ARTICLE VI OF THE WILL AS AMENDED BY THE CODICILS UPON THE GROUNDS OF FRAUD AND UNDUE INFLUENCE ARE PROCEEDINGS IN PERSONAM UNDER THE LAW OF OREGON. THEREFORE, THE FEDERAL COURT HAS JURISDICTION OF SUCH PROCEEDINGS.

(Specifications of Error 4, 5, 6.)

(1) A Federal Court Action Contesting the Validity of Article VI on Grounds of Fraud and Undue Influence Does Not Divest or Interfere With the State Court's Jurisdiction of the Res.

(Specification of Error 4.)

Administration of an estate necessarily involves control of the assets of the estate for the purpose of conserving them for the benefit of creditors, legatees, and heirs and for other numerous purposes which are elementary to the practicing lawyer. It is generally said that a probate proceeding is in rem, i.e., a proceeding which takes control of a res and by appropriate proceedings binds the entire world as to the property in its possession. Therefore, any interference with that possession and that administration would frustrate the purposes of the ordinary probate system. The result is that state probate courts have almost invariably been held to have exclusive jurisdiction of the possession of the property of the estate and the administration of that property. It must be apparent that in this case, no effort is made to divest the state probate court of its complete control of the estate and its administration. The sole purpose is to require the parties who are before the Court to have the estate distributed in accordance with the Federal Court's final judgment as to the course which such distribution should take.

Throughout the earlier parts of this brief we have attempted to make clear to this Court that there is no suggestion of taking control of the property or its administration from the Oregon Probate Court. In fact, it would be impossible to do so, no matter what judgment should be entered in this case. If any one of our claims for relief should be sustained, it will only mean that the executors, the trustees and the Oregon Probate Court will be bound by the judgment of a federal Court to the effect that Article VI is void in whole or in part, as the case may be. This, of course, will result in intestacy as to that part of the estate. Will intestacy take the estate or its administration from the Probate Court? Certainly not. The Probate Court will then be required to determine the identity of the heirs at law and to distribute accordingly. Here the identity of the sole heir is unmistakably established.

In support of the foregoing, we cite the following cases: *Byers v. McAuley*, supra, 149 U.S. 608, 617, 37 L. Ed. 867, 872 (1892); *Waterman v. Canal-Louisiana Bank & Trust Co.*, supra, 215 U.S. 46, 54 L. Ed. 80, 85, and *Spencer v. Watkins*, supra, 169 Fed. 383. In *Spencer v. Watkins*, where the purpose of the action was to void a testamentary charitable trust, the Circuit Court of Appeals said:

It should be added that in purpose and effect *it no more interfered with the probate court in its rightful custody of the estate* than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on contract. (p. 383)

- (2) If the State Law Permits a Proceeding Inter Partes and In Personam—Even in a Probate Court—to Establish the Invalidity of Article VI Upon the Grounds of Fraud and Undue Influence, Then the Federal Court Will Take Jurisdiction of Such Action.

(Specification of Error 4.)

We have already seen that the federal Courts will take jurisdiction of actions to avoid wills or parts thereof upon the ground that they were procured by fraud, such as the suppression of a subsequent will (*Gaines v. Chew*, supra). We have seen that the federal Courts will entertain actions to interpret or construe wills, or parts thereof, and even to invalidate a will or any of its provisions, if either offends against rules against perpetuities (*Blacker v. Thatcher*, supra; *Wood v. Paine*, supra; *Spencer v. Watkins*, supra). Certainly it is now settled that a federal Court will take jurisdiction of an action to determine the identity of the person to whom an estate, or part thereof, should be distributed (*Markham v. Allen*, supra; *Waterman v. Canal-Louisiana Bank & Trust Co.*, supra; *Byers v. McAuley*, supra).

Since the principles and the authorities are well stated and documented in the opinion of Judge Mathes, we quote a part of his opinion at length:

If then a right involving a decedent's estate is such as would have been enforceable in the English Court of Chancery in 1789, and is such as would be enforceable in an action in personam in some court—even a probate court—of the State, a suit to enforce that right may be maintained in a federal court of equity as an action in personam, if diversity of citizenship and the requisite jurisdictional amount exist. (*Markham v. Allen*, supra, 326 U.S. at 494;

Waterman v. Canal-Louisiana Bank & Trust Co., *supra*, 215 U.S. at 43; *Payne v. Hook*, *supra*, 74 U.S. (7 Wall.) at 430; *id.* 81 U.S. (14 Wall.) 252 (1871).) On the other hand, if a right involving a decedent's estate is by state law made enforceable in an action in personam in a State court—rather than solely in rem in probate proceedings, a diversity suit to enforce the right in the federal courts is a “civil action” within 28 U.S.C. Sec. 1332.

This was the ground upon which jurisdiction was sustained in *Broderick's Will*, *supra*, where the Court said: “Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit (District) Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit (District) Courts, as well as by the courts of the State.” (88 U.S. (21 Wall.) at 520.)

So it is that “where a State, by statute or custom, gives to parties interested the right to bring an action . . . to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but . . . this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate. . . .” (*Sutton v. English*, *supra*, 246 U.S. at 205.)

State-created means for the enforcement of a right involving a decedent's estate by a plenary suit or action in personam, rather than in rem in probate proceedings, will be recognized in the federal courts in diversity cases, regardless of whether the state-created means be denominated a state-created right or a state-created remedy. (*Sutton v. English*, *supra*,

246 U.S. at 205; *Farrell v. O'Brien*, *supra*, 199 U.S. at 110; *Ellis v. Davis*, *supra*, 109 U.S. at 494-97; *Broderick's Will*, *supra*, 88 U.S. (21 Wall.) at 519-20; *Looney v. Capital Natl. Bank*, *supra*, 235 F.2d at 438; *McClendon v. Straub*, 193 F.2d 596 (5th Cir. 1952); *Sawyer v. White*, 122 Fed. 223, 227 (8th Cir. 1903); *Williams v. Crabb*, 117 Fed. 193 (7th Cir.), *cert. denied*, 187 U.S. 645 (1902); *McCan v. First Nat. Bank*, 139 F.Supp. 224 (D.Ore. 1954), *aff'd*, 229 F.2d 859 (9th Cir. 1956); *accord: Gaines v. Fuentes*, *supra*, 92 U.S. at 21; *Richardson v. Green*, 61 Fed. 432 (9th Cir.), *cert. denied*, 159 U.S. 264 (1894); *cf: Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497-98 (1923). (R. 36-38).

To these authorities we might add the dictum in *Ellis v. Davis*, already quoted. Again, there is a dictum of this Court in *Carrau v. O'Calligan*, 125 Fed. 657 (1903). There Judge Ross (Judges Gilbert and Morrow concurring) said:

But wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other requisite conditions exist. (p. 663)

We are led to wonder why there is any distinction between an attack upon a clause in a will which is inserted therein by fraud or undue influence and an attack based upon another type of fraud. Why is there a distinction between the fraud and undue influence claims and the claim of invalidity of Article VI by its very terms? The only possible reason for such a distinction is that in some

jurisdictions (*not Oregon*), an attack upon a will is made part of the probate system by legislative fiat. It so happens that Oregon has no statute to that effect and no probate system of which such statute could be a part. This will be developed later in our brief. At this point, we respectfully submit that if Oregon permits a proceeding inter partes in personam in any Court—probate or otherwise—then the Federal Court will take jurisdiction of the same type of case, given the requisite diversity and amount.

(3) Under the Law of Oregon an Attack on a Will Is a Proceeding In Personam and Inter Partes.

(Specification of Error 4.)

The entire basis for the decision of the District Court is that the portion of the complaint and amended complaint which attacks Article VI on the ground of fraud and undue influence is a proceeding in rem and an integral part of the probate proceeding in the Oregon Probate Court. As we have seen, the test of this holding is whether the District Court's concept of the Oregon law is correct or whether, under the law of Oregon, such an attack on a will is a proceeding in personam and inter partes.

We have attached to this brief as an appendix all of the provisions of the Oregon law which are material to the solution of our problem. Chapter 114, Volume I, of *Oregon Revised Statutes*, contains provisions as to the execution of wills and their construction. Chapter 115 is concerned with probate and administration. Section 115.110 provides:

Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.²³

Oregon's only statutory requirements as to making wills is that the testator must be 21 years of age, or more, and of sound mind, and that the will must be attested by qualified witnesses (Secs. 114.020-114.040). None of these provisions is involved in our case. Soundness of mind and due execution are affirmatively alleged in the amended complaint (R. 56, 59, 62, 70, 71, 72).

After establishing the venue of the probate of the will, the first provision for seeking its admission to probate is Section 115.170. It is there said:

Upon hearing of a petition for the probate of a will *ex parte and before contest is filed*, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court.

There follow provisions for affidavits of witnesses outside of the jurisdiction and the production of witnesses in court upon motion of an interested party. It then says:

However, in case of contest of a will or the probate thereof in solemn form, the proof of any and all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in *a suit in equity*.

²³This is a codification of Section 1 of Laws of Oregon, 1893, pp. 31-32. This Act will be discussed later.

The next section, 150.180, reads:

When a will has been admitted to probate, any person interested may at any time within 6 months after . . . the order of court admitting such will to probate contest the same or the validity of such will.²⁴

Section 115.180, as thus quoted, *is the only provision of the statutory law of Oregon for the contest of a will.*

There is no statement of the grounds of contest and no *judicial procedure is provided for the prosecution of a contest.* There is no provision for citing or summoning the parties interested in the will to plead to the contest. So far as we are advised, that is all the law relating to contests.

By judicial legislation and with obvious justification, the failure of a will to conform to the requirements of Chapter 114 (mental competency and proper attestation) have been customarily accepted as grounds for contest. (*Hubbard v. Hubbard*, 7 Or. 42 (1879); *In Re Mendenhall's Will*, 43 Or. 542, 73 Pac. 1033 (1903); *Johnson v. Helmer*, 100 Or. 142, 196 Pac. 385 (1921).)

There are also cases which accept jurisdiction of contests of wills on grounds of undue influence or invalidity because of violation of the rule against perpetuities. (*Hubbard v. Hubbard*, *supra*; *Johnson v. Helmer*, *supra*; *In Re Sturtevant's Estate*, 92 Or. 269, 178 Pac. 192 (1919); *Leadbetter v. Price*, 102 Or. 159, 199 Pac. 633 (1921).)

The Oregon Courts have fixed jurisdiction of contests in the Court in which the will is probated. (*Greenwood*

²⁴This is Section 4 of the 1893 Statute mentioned in footnote 23.

v. Cline, 7 Or. 17 (1879); *Clark's Heirs v. Ellis*, 9 Or. 128 (1881); *Luper v. Werts*, 19 Or. 122, 23 Pac. 850 (1890).) No statute says this, but it was certainly convenient to select the most convenient Court.

Failing any statutory procedure for will contests as such, the Oregon statutes do provide a procedure under the general probate statute (115.010). This statute reads as follows:

No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction *is in the nature of a suit in equity* as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

- (1) A *citation* to a party.
- (2) A verified *petition* of a party in interest.
- (3) A subpoena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees.²⁵

Since the mode of procedure in the exercise of jurisdiction in the Oregon Probate Courts is in the nature of a suit in equity, it is only natural that all proceedings

²⁵This statute is in substantially the same form as has been the law in Oregon since June 1, 1862. See Oregon Revised Statutes Annotations to Section 115.010, p. 834.

therein, including the will contest, should be initiated by a petition.²⁶

A suit on the *equity side* of the Court of Chancery on behalf of a subject is ordinarily commenced by preferring a *petition* . . . This petition . . . is called in the old books An English Bill . . . (Daniell's Chancery Pleading & Practice, Vol. 1, p. 2. (6 Am. Ed.) 1894.)

Since the Oregon Probate Courts proceed as in a suit in equity, it is also entirely proper that its process should be a *citation*. A citation, it is said, "is usually the original process in any proceeding and is in all respects analogous to . . . the subpoena *in chancery*." (Cyclopedic Law Dictionary, p. 151 (Calaghan and Company 1912).) A subpoena in chancery is what is called a summons under Federal laws (Cyclopedia of Federal Procedure (Third Edition), Vol. 3, Sec. 11.14, pp. 354-356). We cite from an opinion in a New Jersey case because, until recently, the Courts in that state, adhered closely to the traditional equity forms. In *Fraser v. Fraser*, 77 N. J. Eq. 205, 207, 75 Atl. 979 (1910), the court held:

. . . a bill is in reality a petition by another name, and the only difference between a bill and a petition is that the latter is less formal in its averments and prayers and the defendant is brought in by process called a "citation," instead of by subpoena ad re-

²⁶This Court in its opinion in *Richardson v. Green*, *supra*, specially noted that in Oregon a will contest is initiated by filing a *petition*, and that in the petition, "the same facts are set forth as would be under the same circumstances in a bill in equity." This mode of procedure was one of the facts that convinced this Court that in Oregon a contest of will was an action inter partes (61 Fed. 427).

spondendum, and is required to answer in shorter time (p. 980).

It is hardly necessary to cite further authority to the effect that in equity a bill and a petition are the same and that a subpoena and a citation are the same.

Similarly, it is unnecessary to cite authority to the effect that equity acts in personam. We will content ourselves with a quotation from American Jurisprudence as follows:

The maxim announcing the principle that equity acts *in personam*, not *in rem*, is regarded as basic to a discussion of equitable jurisdiction. From early times, an exercise of the Chancery court's power has been considered to depend on jurisdiction over the parties by reason of their presence and residence, and not on the jurisdiction over the situs of property in respect of which relief is sought, since obedience to decrees is compelled by attachment against the persons of parties.

(19 *Am. Jur., Equity*, Sec. 23, p. 52.)

In 1949, the Oregon Legislature enacted a statute transferring jurisdiction of probate in Multnomah County from the County Court to the Circuit Court. We quote this statute because it again emphasizes that in Oregon probate jurisdiction of will contests is equity jurisdiction. The statute reads as follows:

There also is conferred upon, and vested in, the circuit court of a judicial district described in ORS 3.310 full, complete, general and exclusive *jurisdiction, authority and power in equity*, in the first instance, in all matters whatever pertaining to a court of probate, including the construing of, and declara-

tion of rights under, wills and codicils, and therein the determining of questions of title to real, personal, or mixed properties . . . (ORS 3.340).

ORS 3.310 refers to one county having a population of more than 300,000 persons. That county is Multnomah, wherein lies the City of Portland. The transfer of jurisdiction from the County Court to the Circuit Court did not change any then existing law. Section 3.350 says, "In any cause, matter or proceeding over which by existing laws the circuit court of a judicial district described in ORS 3.310 has jurisdiction, the procedure and practice shall be governed by the existing laws applicable to such cause, matter or proceeding without change." This was apparently the view of Judge Mathes (R. 43-44). However, he completely overlooked the fact that before 1949 proceedings in probate were in the nature of suits in equity; i.e., *inter partes* and *in personam*. The 1949 Statute restated this by specifically referring to "jurisdiction, authority and power in equity."

To recapitulate, full jurisdiction in equity is vested in all matters pertaining to a Court of probate (ORS 3.310). The procedure in probate is the procedure of a Court in equity (ORS 115.010). Questions of fact are proved in accordance with the practice in a suit in equity (115.170 (3)). This has been the law since Oregon became a state in the Union. It was not changed by the transfer of probate jurisdiction from County Courts to Circuit Courts in Multnomah County. In fact, it was reaffirmed. This having been established, the Federal Court will not permit itself to be divested of jurisdiction (*Waterman v. Canal-Louisiana Bank & Trust Co.*, *supra*; *Blacker v. Thatcher*, *supra*).

Before leaving this subject, it might be well to state the historical background of the Oregon law. In 1843, the citizens of what was then Oregon territory adopted by reference the law of Iowa as to judicial power and procedure, and specifically said that the laws of Iowa Territory “respecting wills and administrators shall be the law of this territory.” (Act of July 5, 1843, Art. 14.) The law of Iowa Territory 1838-1839, page 471, said, *inter alia*, “That if any person interested shall, within five years after the probate of any such will, testament or codicil, in the court of probate as aforesaid, appear and by his *bill in chancery*, contest the validity of the same, an issue of law shall be made up whether the writing produced be the will of the testator or testatrix, or not.” There has been no real change in the law of Oregon as to will contests since that time.

The District Judge’s opinion seems to indicate that the Act of 1893 (Laws of Oregon 1893, pp. 31-32), mentioned above, made a change. Since that idea seems to have put a doubt in the Judge’s mind as to the authority of *Richardson v. Green* (see *infra*), it is desirable to analyze the 1893 Act. This Act was in four sections. The first section provides for the delivery of a will by a custodian thereof. That is now 115.110 of the Revised Statutes. Section 2 provides for a petition by an executor, devisee or legatee to prove a will. That is now 115.120. Section 3 is now 115.130; it provides for the production of wills.²⁷

²⁷In the 1893 Statute, there was a sentence which made it a contempt to refuse to produce a will in obedience to the Court’s order. This was dropped from the revision of 115.130 because the same thing is provided for in 33.010(1)(e).

Section 4 of the Act says that a will may be contested and provides a time limitation of one year after admission to probate within which a contest may be filed, except in case of disability. This is now 115.180.²⁸

In 1893 there were only two changes in the law and no more. One was to add to the law a provision to require custodians of wills to deliver them for record (Sections 1 and 3). A time limitation was added (Section 4). The provision for a contest was *not new*. The best way to prove this is to point out that if the legislature had attempted to make any changes in the law, other than the two mentioned, such enactment *would have been unconstitutional*.

Section 20 of Article 4 of the Oregon Constitution provides that the subjects of all acts "shall be expressed in the title . . ." "If any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." With this fundamental law in mind, let us examine the title of the 1893 Act:

AN ACT to require custodians of wills to deliver the same for record and to provide the time within which the probate of wills may be contested.

Thus, if there were anything new other than delivery and time limitation, the new part would have been void.

²⁸There is a saving clause in the 1893 Act applicable to wills already admitted to probate at that time. This has been dropped because unnecessary. The one-year limitation has been changed to six months.

In order to prove the point that the law was changed, the District Judge says that the Oregon Courts have interpreted the 1893 legislation “as conferring exclusive jurisdiction over such will contests upon the probate courts as such, at that time solely the County Courts—and not upon the Oregon courts of general equitable jurisdiction, the Circuit Courts.” (R. 47.) To support this statement, there is cited *Florey v. Meeker*, 194 Or. 257, 240 P.2d 1177, 1187 (1951). As we have pointed out repeatedly, it makes no difference what Court hears will contests, whether a Probate Court or a Circuit Court. We have never claimed that will contests must be tried in Courts of general jurisdiction. We claim and have proved that a will contest in Oregon is in personam.

However, it may not be amiss to look as *Florey v. Meeker*. There the Court held:

Any issue relative to the sufficiency of the codicil’s execution was properly determinable in the court of probate. (p. 1187.)

The 1893 Statute was not mentioned. The rule thus stated is and has been the Oregon law for almost a hundred years. If Judge Mathes meant to add anything to Oregon law by the words “as such” following “the probate court,” we must respectfully dissent. A will contest in Oregon is a proceeding in personam in the statutory Court delegated to hear and decide the case.

We have read all of the Oregon authorities cited in the District Judge’s opinion and in the comprehensive briefs of our learned adversaries. We have made our own independent research. We have not found one word in any decision of an Oregon Court which says or intimates

that a will contest is a proceeding in rem. Except as outlined above, there is not a word in the cases or in the statutes which tells us how a will contest is to be prosecuted. The statutes and cases are consistent on the subject of pleadings, process, evidence, and form. So we must ask what sort of legal proceeding is involved? Is it a proceeding in rem? Not under the Oregon law. We can best demonstrate this by contrasting Oregon law with the law of other states in this circuit. Our investigation should start with *Broderick's Will*, supra, 88 U.S. 503, 22 L. Ed. 599 (1875).

That case describes the California system. In general, the California system has been adopted in Arizona, Idaho, Montana, Nevada and Washington.²⁹ It will not be necessary for us to go much further than *Broderick* to describe the probate systems of all these states and their provisions for contest of wills.

According to Mr. Justice Bradley, the California law, as it stood in 1860, provided for the filing of a petition for the probate of a will. A day was appointed for proving the will and notice was published in a newspaper. Citations were issued to the heirs residing in the county, and to any executors named in the will and not joining in

²⁹Arizona Revised Statutes, Chapter 3, Sec. 14-301 - 14-376.

Idaho Code, Title 15, Chapter 1, Sec. 15-101 - 15-102; Chapter 2, Sec. 15-201 - 15-238.

Montana Revised Codes, Chapter 8, Sec. 91-801 - 91-811; Chapter 9, Sec. 91-901 - 91-907; Chapter 10, Sec. 91-1001 - 91-1003; Chapter 11, Sec. 91-1101 - 91-1107; Chapter 12, Sec. 91-1201 - 91-1207.

Nevada Revised Statutes, Chapter 136, Sec. 136.010 - 136.270; Chapter 137, Sec. 137.010 - 137.130.

Washington Revised Code, Chapter 11.20, Sec. 11.20.010 - 11.20.100; Chapter 11.24, Sec. 11.24.010 - 11.24.050.

the petition. On the return day "any person interested might appear and contest the will." Should there be minors or non-residents of the county interested, the Court was required to appoint an attorney to represent them. At the contest *before probate*, written grounds of opposition were filed, issues were formed, and the case was sent to a jury, unless a jury was waived. The grounds of such a petition were incompetency, restraint, undue influence, fraudulent representations, and any other cause affecting the validity of the will. Also, "various provisions were added, calculating to secure a thorough investigation on the merits." (88 U.S. 516, 22 L.Ed. 604.)

May we point out that all of the foregoing, which is provided for *prior* to the admission of the will to probate, is in marked contrast to the Oregon system of probate in common form without notice and *without the possibility of a contest*. The Supreme Court's opinion continues as follows:

It was further provided, that when a will had been admitted to probate, any person interested might at any time within one year after such probate, contest the same or the validity of the will by filing in the same court a petition containing his allegations against its validity or the sufficiency of the proof, and praying that the probate might be revoked. Hereupon *new citations* were to be issued and a new trial had. But it was declared that if no person should within one year appear to contest the will or probate, the latter should be conclusive, saving to infants, married women, and persons of unsound mind, a like period of one year after disability removed. . . .

In view of these provisions, it is difficult to conceive of a more complete and effective probate juris-

diction, or one better calculated to attain the ends of justice and truth. (88 U.S. 516, 517, 22 L. Ed. 604)

The present California law is not very different. The notice provisions are perhaps somewhat more comprehensive; e.g., heirs, legatees and devisees must be served with written notice of the hearing of the petition for probate (Calif. Probate Code, Sec. 328). The contest provisions are substantially the same, except that now, when there is a contest before probate, citation must be issued to the heirs and to all persons interested in the will. When there is a contest after probate, the citation is issued to the executor, devisees, legatees, and heirs. Thus, the California system necessarily involves *notice and citation to all persons interested*, whereas Oregon is silent on the subject of the party or parties to whom citation must be directed when a will is under attack. The result is that a judgment in a will contest in Oregon is only conclusive upon the parties to the case. This is the only reasonable interpretation of ORS 43.130.

This section is concerned with the conclusiveness of judgments. It is there said in subdivision (1) that a judgment against a specific thing in respect to "the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political or legal condition or relation of a particular person is conclusive . . ." Subdivision (2) says that in other cases the judgment is conclusive "between the parties and their representatives and successors." This means that the *original probate* of a will in common form (*ex parte* or without notice) is conclusive unless there is a contest.

This is what the Court decided in *Hubbard v. Hubbard*, 7 Or. 42 (1879) when it said:

It is provided in this state that county courts shall be vested with the exclusive jurisdiction in the first instance to take proof of wills (Code Sec. 969). And their judgments and decrees are held to be conclusive in collateral proceedings, and in every other instance until they are vacated by proceedings on appeal, *or successfully impeached in some known and recognized legal method* (Jones v. Dove, 6 Or. 188 (1876) (p. 44).

This quotation from *Hubbard* is taken almost verbatim from *Jones v. Dove*, 6 Or. 191. The part quoted follows a statement in the *Jones* case, that "With us, the courts of common law and equity have no *original jurisdiction* or right to determine whether a will has been *legally executed or not.*" (pp. 190-191.) These early decisions are important, because they demonstrate that it is the unchanged law of Oregon that a will shall be admitted to probate *ex parte* and without notice; that only the probate court determines in the first instance whether the will so submitted has been legally executed; and that the decree admitting the will to probate is conclusive, unless "successfully impeached." They indicate that there is no way to attack a will until after it is admitted to probate.

In *Luper v. Werts*, 19 Or. 122, 23 Pac. 850 (1890):

The formal probate having been made *ex parte*, is not considered of any importance when the validity of the will is attacked by a direct proceeding. The practice, however, in such cases, would be very much simplified if the *legislature* were to require the pro-

bate court, when a petition for the probate of a will was filed, to issue a citation, to be served upon the parties interested in the estate, to show cause why the will should not be admitted to probate, and have any contest which might be made against it determined upon the return of the citation (p. 852).

The Legislature has not made such provision; neither have the Courts.

Because of the fundamental law of Oregon, as stated in the cases cited, it was held in the only case which has ever directly considered the point involved here (*Richardson v. Green*) that a will contest in Oregon was a direct attack in an action *inter partes* and *in personam*.

- (4) **The Only Case in Any Jurisdiction Which Has Decided the Question as to Whether a Will Contest in Oregon Is Inter Partes and In Personam or In Rem Is Richardson v. Green. That Case Holds That a Contest Is Inter Partes. It Is Still Law.**

(Specifications of Error 5, 6.)

In *Richardson v. Green*, supra, certiorari was denied by the Supreme Court. The decision was approved by this Court in *Carrau v. O'Calligan*, supra, 125 Fed. 657 (1903). *Richardson v. Green* is so important to the result of this appeal that we are forced to discuss it at length. The case involved a diversity action to have a will declared invalid upon the ground that it was "false, forged and fraudulent." The defendants demurred upon the ground of lack of jurisdiction and their demurrer was overruled without an opinion on the subject of jurisdiction (61 Fed. 425). After plaintiffs prevailed in the trial Court, defendants appealed to this Court. The objection

to the jurisdiction of the Federal Court was apparently argued and briefed extensively. The Court held that the proceeding was inter partes and in personam, and therefore was within the jurisdiction of the Federal Court.

Judge Knowles attacked the question straight on. He asked, "Did the circuit court have jurisdiction of this cause, or was it within the exclusive jurisdiction of the county court of Multnomah County?" (61 Fed. 425.) The opinion points out, as we have, that the county court had exclusive jurisdiction in the first instance in matters pertaining to a Court of Probate.³⁰ Then says the Court, there is no definition of what is meant by Probate Courts and there is no common law definition. Therefore, the Court turned to *Hubbard v. Hubbard*, 7 Or. 42, supra, to ascertain the Oregon law. It quotes *Hubbard* to the effect that under the English practice there were two modes of proving a will of personal property, the "common form," which is propounded by the executor and proved ex parte, and the "solemn form" in which there is a citation to the next of kin and proof is taken by testimony, but that "in this state, probate in common form is the only one which appears to have been adopted by any positive enactment of the legislature." (61 Fed. 426.)

The next case cited is *Luper v. Werts*, 19 Or. 122-126, 23 Pac. 850, supra. As we have seen, *Luper* says that it would be better if the Legislature authorized "the probate court to issue a citation and permit a contest before probate." From *Hubbard* and *Luper*, the Court deduces that "there was no law in Oregon when this

³⁰In cases arising in Multnomah County, transferred to the circuit court of that county sitting in probate by the Act of 1949.

action was commenced to warrant any contest upon the validity of a will at the time the same was being probated." This situation has never been changed.

In passing, the Court points out that, although in England probate in common form of a will devising real property is subject to collateral attack, this is not so in Oregon. In Oregon, a will is attacked by a "direct proceeding."³¹ (61 Fed. 426.) The Court then analyzes the nature of the direct proceeding. It finds that the cases cited, which were will contests, were between *parties* and were not proceedings in rem. The Court points out that in a proceeding in rem the contest is against the validity of the will and that there are no parties in the sense that one is plaintiff and the other defendant.³²

To demonstrate the proposition that there were parties to these will contests, the Court calls attention to *Clark's Heirs v. Ellis*, 9 Or. 133 (1881), which starts:

This proceeding was originally commenced in the County Court of Union County by petition of respondents as heirs at law of William Clark, deceased, against the appellants, to set aside the will of said Clark and to revoke the probate thereof (61 Fed. 427).

The Court returns to *Luper v. Werts*, *supra*. Luper filed a petition in the county court to vacate the order admit-

³¹Citing: *Jones v. Dove*, 6 Or. 188 (1876); *Hubbard v. Hubbard*, 7 Or. 42 (1879); *Brown v. Brown*, Id. 299 (1879); *Clark's Heirs v. Ellis*, 9 Or. 133 (1881); *Chrisman v. Chrisman*, 16 Or. 128, 18 Pac. 6 (1888); *Luper v. Werts*, 19 Or. 122, 23 Pac. 850 (1890); *Potter v. Jones*, 20 Or. 240, 25 Pac. 769 (1891); *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453 (1892).

³²In California the statute requires the parties to be so designated, but this is a matter of convenience and does not change the remedy (Probate Code, Section 371).

ting the will to probate, alleging that the pretended will was void. The administrators with the will annexed filed an answer. As to *Luper*, this Court said:

It is evident that this was a trial between the parties. In the Supreme Court one party is termed the appellant and the other the respondent. In the petitions named . . . the same facts are set forth as would be under the same circumstances in a bill in equity (61 Fed. 427).

The Court then turns to the question of whether the proceeding before it was a suit in equity and cites *Gaines v. Fuentes*, 92 U.S. 10, 23 L.Ed. 524 (1875). This was an action to annul a will as a muniment of title. Justice Field held that this was “not a proceeding to *establish* a will, but to annul it as a muniment of title, and to limit the *operation of the decree admitting it to probate*.³³ It is in all essential particulars a suit for equitable relief, to cancel an instrument alleged to be void . . .” Judge Knowles analyzes Justice Field’s holding that a Federal Court has no jurisdiction of a proceeding to *probate* a will, by repeating Justice Field’s quotation from *Gaines v. Fuentes*, as follows:

The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties. Indeed, in the majority of instances, no such controversy exists. *In its initiation all persons are cited to appear . . .* From its nature, and from the want of parties, or the fact that all the world are parties, the

³³This is substantially the form of the decree which we seek with reference to Article VI of the will.

proceeding is not within the designation of cases at law or in equity (61 Fed. 427-428).

The Court then cites *Ellis v. Davis*, 109 U.S. 485, 27 L.Ed. 1006, *supra*, to show that the Supreme Court there made a distinction between "the probate of a will and an action to try the validity of a will between parties, and when there is a decree or judgment which affects only the parties to the action." Next the Court distinguishes the *Broderick Will* case, *supra*, by pointing out that proof of a will in California is of solemn character and much different from the *ex parte* mode of probating a will in Oregon. It concludes:

The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, *and binding only the parties thereto*, and hence is such a one as a circuit court of the United States could take jurisdiction of when the amount in controversy is sufficient, and the parties plaintiff and defendant citizens of different states (61 Fed. 428).

The Court again considers *Gaines v. Fuentes*, *supra*, which it analyzes as "a suit to annul a will and limit the operation of its probate." The opinion says that the Supreme Court held, as it did, that the suit was in the nature of equitable relief, saying:

There are no separate equity courts in Louisiana,³⁴ and suits for special relief of the nature here sought are not designated "suits in equity," but they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can

³⁴This is because Louisiana is a civil law state, wherein there was never any distinction between law and equity (40 C.J. Modern Civil Law pp. 1243-1244).

be maintained in a state court, *whatever designation that court may bear*, we think they may be maintained by original process in a federal court where the parties are, on the one side, citizens of Louisiana, and the other, citizens of other states (61 Fed. 428).

The Court then applies this holding of the Supreme Court to the case at bar, saying:

Here it will be seen that if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any state court where the action arose, *whether the same is a county court or a probate court or a district or circuit court*, the proper federal court will have concurrent jurisdiction of the same with such state courts . . . It should be observed, also, that when it is customary for such state courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them. *It is not necessary that a statute should exist authorizing the same.* The suit in the county court of Oregon in such matters is not authorized directly by any statute, but is *a customary exercise of jurisdiction* (61 Fed. 428).

The Court mentions *Ellis v. Davis*, *supra*, and quotes from that case the part which says that a federal court has jurisdiction of a will contest where the state law permits this to be an inter partes proceeding (quoted *supra*).

The decision next considers the subject of adequate remedy at law and speedily disposes of that point. Then it considers the fact that the will had not been probated at the time when the bill in equity was filed. It disposes of this argument first on the theory that even if this were so, the plaintiffs should have relief in equity. How-

ever, the most weight is placed on a second ground. This is that twenty-four days after the bill in equity was filed the will was filed and admitted to probate in the Multnomah County Court. This Court held that the bill could have been amended as of the date of probating and moreover that any defect in the bill was cured by the answer of the defendants. This alleged the actual admission of the will to probate.

The concurring opinion of Judge McKenna (later a Justice of the Supreme Court) is much briefer, but is equally persuasive. Judge McKenna said that equity courts, by virtue of their general equitable powers, may not set aside the probate of a will. Then the Judge holds as follows:

But where such a remedy is given to a state court by an action *inter partes*, the remedy may be adopted by the federal courts if the controversy is between citizens of different states. By the constitution of Oregon (article 7, Sec. 12) and by its statutes (Hill's Ann. Laws, Sec. 895) the county court has exclusive jurisdiction in the first instance of the probate of wills. The probate is in the common form, but the judgment is conclusive until set aside on appeal or impeached by direct proceedings (*Jones v. Dove*, 6 Or. 188; *Hubbard v. Hubbard*, 7 Or. 44); and all acts done under it in the course of administration are valid (*Brown v. Brown*, Id. 285). A suit, however, may be maintained in the county court to declare the will void, and revoke its probate. *Clark's Heirs v. Ellis*, 9 Or. 132, and cases *supra*. The nature of this suit is not precisely defined by the decisions, but *it is certainly inter partes*, and seems to be within the doctrine declared in *Ellis v. Davis*, 109 U.S. 496, 497, 3 Sup. Ct. 327. This remedy existing in the

Oregon courts, it could be exercised by the United States circuit court, but preliminary probate of the will was essential to it (61 Fed. 435).

The concurring opinion then considers the fact that the will had not been admitted to probate when the suit was brought. This opinion says that the will was probated twenty-three days after the bill was filed although the main opinion says that it was twenty-four days. This filing, says Judge McKenna, was set forth both by plea in abatement and in the defendants' answer. So, says the Judge:

The answer, however, brought into the pleadings the necessary condition of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. It was sufficient if the court had jurisdiction at the time the decree was entered (61 Fed. 436).

We have given some consideration to the contention that the will had not been probated at the time the action was brought in *Richardson v. Green*, because the opinion of the District Judge in our case says, in so many words, that this made all the rest of the decision dictum! We will consider this in more detail when we discuss fully the District Judge's refusal to follow *Richardson v. Green*. Of course, the Jackson will was admitted to probate before this action was commenced. This does not in the slightest degree change the binding effect of *Richardson v. Green* upon a District Court, so long as *Richardson v. Green* remains the unquestioned law of this circuit as stated by this Court and as at least left untarnished by the refusal of the Supreme Court to grant certiorari.

We repeat that *Richardson v. Green* is the only decision, State or Federal, which has decided one of the important questions which has been presented to this Court, viz. that our attack on the ground of fraud and undue influence is *inter partes*. However, this Court sustained *Richardson v. Green* in *Carrau v. O'Calligan*, 125 Fed. 657. This case arose in the State of Washington. It involved an action by foreign heirs to set aside a nuncupative will which had been admitted to probate. The jurisdiction of the Federal Court was vigorously attacked. The decision of the District Judge appears in 116 Fed. at page 934. It is interesting to note that the District Judge upheld federal jurisdiction. He said, concerning defendants' jurisdictional arguments, that they had been

. . . decided adversely to the contentions of the defendant, by the supreme court of the United States, and by the circuit court of appeals for the Ninth circuit; and, as the courts of last resort have settled the law, it would be unbecoming for this court to discuss the questions further. Every point made in the defendant's argument has been squarely met and fully answered by the opinions in the cases of *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Gaines v. Fuentes*, 92 U.S. 10, 22, 23 L. Ed. 524; *Byers v. McAuley*, 149 U.S. 608, 621, 13 Sup. Ct. 906, 37 L. Ed. 867; ***Richardson v. Green***, 9 C.C.A. 565, 61 Fed. 423, 436; *Id.*, 159 U.S. 264, 15 Sup. Ct. 1042, 40 L. Ed. 142 (116 Fed. 934).

The District Judge in *Carrau* overlooked the difference between the state practice in the cases cited and the state practice in Washington. The Circuit Court of Appeals for this Circuit did not overlook the difference.

A distinguished bench decided the *Carrau* case for this Court; namely, Judges Gilbert, Ross and Morrow, Judge Ross speaking for the Court. This Court reversed the District Court, because of the Washington law on the subject of will contests. It held, on the authority of *Broderick's Will*, that the general rule is that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof. Then the decision considered the question of jurisdiction in states which have a different system, and in particular the State of Oregon. The Court said:

But wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other requisite conditions exist. Thus, *in the case of Richardson et al. v. Green . . . this court affirmed the decree of the lower court which canceled the will; thus sustaining the jurisdiction of the federal courts in the matter.* But it did so for the reason, as plainly appears from the opinions of the judges deciding the case, that it was found that while, under the laws of Oregon, the county courts of that state were given exclusive jurisdiction in the first instance to take proof of wills, there was no provision of the Oregon law "to warrant any contest upon the validity of a will at the time the same was being probated," but authority in any one interested in the estate *to attack the will by an independent suit at any time after its probate.* This court, having found that such a remedy existed in the Oregon courts, very properly held that it could be exercised by the United States Circuit Court for

that state, the requisite diverse citizenship and other requisite conditions existing (125 Fed. 663).

But, says the Court, the law of Washington is different. It recites the various provisions of Washington law as to the probate of wills and contests thereof. These are just as elaborate as the California law discussed in *Broderick's Will*.

Carran v. O'Calligan went to the Supreme Court and is there reported as *O'Callaghan v. O'Brien*, 199 U.S. 89, 50 L. Ed. 101 (1905). The Supreme Court, after analyzing *Broderick's Will*, *Gaines v. Fuentes*, *supra*, *Ellis v. Davis*, *supra*, and *Byers v. McAuley*, *supra*, held that the following principles were established: First, "matters of pure probate" are not within the jurisdiction of the federal courts, and second, "where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States . . . will enforce such remedies . . ." The Court then held:

The cited authorities establish that the words referred to must relate only to independent controversies *inter partes*, and *not to mere controversies* which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect (199 U.S. 110, 50 L. Ed. 111).

Then follows language which is most significant. The Court said:

Thus, if a state law provides for any form of notice on an application to probate a will, and authorizes a contest before the admission of the writing to probate, then it would follow, if the words "suit or action of *inter partes*" embraces such a contest, the proof of wills, if contested by a citizen of another state or alien, would be cognizable in the courts of the United States, and hence not under the exclusive control of the state probate court. Again, if a state authorized a will to be proved in common form, that is, without notice, and allowed a supplementary probate proceeding by which the probate in common form could be contested, then, again, if such a contest be a suit *inter partes*, it would also be a Federal cognizance (199 U.S. 111, 50 L. Ed. 111).

The Court next analyzes the statutory provisions in Washington as they are analyzed in the decision of the Circuit Court of Appeals and concludes that in Washington the contest "is an essential part of the probate procedure . . . and does not therefore cause a contest when filed, to become an ordinary suit between parties." (199 U.S. 114, 50 L. Ed. 111.) Having so concluded and having discussed the Supreme Court's decisions *pro* and *con*, it was unnecessary for the Supreme Court to discuss *Richardson v. Green*, which held that in Oregon the proceeding was *inter partes*.

From the foregoing, it is clear that in Oregon the statute provides for the proving of a will in common form without notice. It is equally clear that a direct pro-

ceeding is allowed in Oregon, whereby probate in common form may be contested. This brings us to the paramount question: Is that contest a suit *inter partes*? The suit is in the form of a suit in equity. It is instituted by a petition. Its process is a citation. The citation may be issued to such persons as the contestant or plaintiff selects and the result of the case, if favorable to plaintiff, is *binding only upon the parties cited*. The case is tried as an equity case. In such a suit between parties or is it between the contestant and the rest of the world; i.e., in *rem*? Surely, that question has been answered in *Richardson v. Green*.

However, Judge Mathes held that *Richardson v. Green* is distinguishable. With the utmost deference, we are compelled to say that the attempt of the District Judge to distinguish is not persuasive. The distinction starts with the following statement concerning *Richardson*:

This case contains jurisdiction of questions only *superficially* similar to those raised in the case at bar.

Our only answer to the adverb italicized is to offer in evidence the main opinion, the concurring opinion and the Carrau opinion. The supposed distinction is set forth on pages 45 to 47 of the record. We respectfully refer this Court to the opinion because it would even more unduly extend this brief to quote the opinion at length. Suffice it to say, these are the points made—most of them erroneous, as we respectfully submit:

First, in *Richardson v. Green*, plaintiff was seeking an adjudication that a deed and a will were forgeries.

Second, the purported will had not been admitted to probate or offered for probate.

Third, the Circuit Court of Appeals held that the Federal Court had jurisdiction as to both the deed and the will because they were suits in equity cognizable in the Circuit Court of Oregon—a state court of general jurisdiction.

Fourth, the attack upon the deed would ordinarily have been the subject of an action at law, but the legal remedy was inadequate because of the grantee's right of curtesy.

Fifth, since the will which had not yet been proved in the Probate Court, the attack upon the validity of the will was within the *in personam* jurisdiction of courts of equity.

Sixth, upon the peculiar facts of the *Richardson* case, the decision was an unnecessary but nonetheless correct view of Oregon equity jurisdiction, because *Richardson* was a suit to contest an unproved will. But, says the District Judge's opinion:

The holding may not correctly be extended to include the *dictum* as to actions to set aside wills after the probating of the same in Oregon (R. 46).

Seventh, assuming that this "dictum" is considered a part of the decision, the Act of 1893 (now ORS 115.180) was passed while *Richardson v. Green* was pending. This enactment has been interpreted by the Oregon courts as conferring exclusive jurisdiction over will contests upon Probate Courts as such, citing *Florey v. Meeker*, *supra*, 194 Or. 257, 240 P.2d 1177, 1187.

We will consider these supposed distinctions in order:

First, it is true that plaintiff was seeking an adjudication that a deed and a will were forgeries.

Second, it is true that the purported will had not been admitted to probate or offered for probate when the suit was commenced. However, it was admitted to probate twenty-four days later.

Third, it is entirely incorrect to say that this Court upheld federal jurisdiction because the causes of action "were suits in equity cognizable in the Circuit Court of Oregon—a state court of general jurisdiction." Judge Knowles clearly held that it made no difference what Court would take the case in Oregon so long as some proceeding *inter partes* was available. He said that so long as the suit could be prosecuted in any state Court where the action arose "whether the same is a county court or a probate court or a district or circuit court, the proper federal court will have concurrent jurisdiction." (61 Fed. 428.)

Fourth, the Court did say that the attack upon the deed would have been the subject of an action at law, because the common law actions for the possession of real property are actions at law. It is true that as to the deed, the *Richardson* case was properly in equity. What about the will? Neither of the judges in *Richardson* held that the Federal Court had jurisdiction solely because there was no adequate remedy at law. Almost the entire opinion in *Richardson v. Green* was devoted to the proposition that some form of action *inter partes* to attack the will would lie in a state Court, irrespective of the particular Court designated by Oregon law.

Fifth, as to the fact that the will had not yet been proved in the probate court, both judges gave this point careful attention. We deny categorically that either judge held that the attack upon the validity of the will is within the *in personam* jurisdiction of the state Court *because* the will had not been probated. The decisions were directly contrary. This subject requires further analysis.

Judge Knowles started his discussion with this statement:

There is another question of more moment and difficulty presented in the fact that at the time the bill was filed in this action the will had not been probated (61 Fed. 429).

After his discussion of the subject of adequacy of the legal remedy, he says:

But let it be conceded that as a rule of law the relief asked in this bill *could not be granted until the will was probated*, that no rights in relation to it capable of being contested between the parties could arise, then how stands this case? (61 Fed. 431.)

Judge Knowles went on to show that the will had been probated in Oregon within twenty-four days after the bill was filed. This probate had been alleged in defendants' plea in abatement and their answer. He upheld the complaint and his jurisdiction on two grounds. One was that the bill could then have been amended to allege the probate of the will, "although it was a fact that occurred after the suit was filed and 'a condition of bringing' the suit." (61 Fed. 431.) Thus it was clearly held that the attack must be made after probate and not before

probate. Judge Knowles held that the plea and the answer *cured the insufficiency of the bill*.

Judge McKenna also referred to the fact that the will had not been probated. He said, "This probate had not been made when the suit at bar was brought. It therefore follows that no cause of action existed to cancel the will." (61 Fed. 436.) (Thus also holding, as had Judge Knowles, that probate of the will was essential.) Judge McKenna then said that the answer alleged the probate of the will. "The answer, however," he held, "brought into the pleadings the *necessary condition* of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. It was sufficient if the court had jurisdiction at the time the decree was entered." (61 Fed. 436.)

Surely it must be clear that both judges decided the case upon the theory that there must be a probated will to establish the jurisdiction of the Court. How, then, was it possible for the District Judge in our case to say that *Richardson* involved an "unprobated will"; that the attack in *Richardson v. Green* (was) "upon the validity of the will, as yet unproved". The foregoing disposes not only of the fifth distinction, but also the sixth distinction. This is based upon the theory that the Court's decision was "dictum".

At the risk of prolixity, may we suggest that there is no possible basis for the District Judge's statement that "the holding (in *Richardson*) may not correctly be extended to include the *dictum* as to actions to set aside wills 'after the probating of the same in Oregon'?" (R.

46.) Had there been a *dictum*, it would have been a statement that there was no jurisdiction before probate. The decision was concerned solely with a contest of a will after probate.

This brings us to the seventh alleged distinction, viz., that the Act of 1893 "has since been interpreted by the Oregon courts as conferring exclusive jurisdiction over such will contests upon the probate courts as such." (R. 47.) In the first place, as we have already demonstrated, the Act of 1893 did not change the law applicable to the prosecution of will contests, except that it provided for a statute of limitations. We have shown that if the Act of 1893 enacted any new law, other than provisions for the production of wills and creating a statute of limitations, any such other part of the Act would have been unconstitutional and void. We have established that the 1893 statute did not confer any jurisdiction upon Probate Courts, because the Probate Courts were always the Courts which had jurisdiction of will contests. The fact that jurisdiction is in the Probate Court is of no consequence. All of the decisions of Courts of last resort hold that it makes no difference whether the Court is one of general jurisdiction or a Probate Court. The form of the action is the touchstone of federal jurisdiction.

Finally, as we have already mentioned, the citation of *Florey v. Meeker*, *supra*, is erroneous. It is cited by the District Judge to a point which it did not touch upon. The District Court cited *Florey* as holding that the Act of 1893 has been interpreted "as confining exclusive jurisdiction over such will contests upon the probate courts

as such, . . . and not upon the Oregon courts of general equitable jurisdiction, . . .” The only thing in *Florey* which has even a shadow of relevancy is its holding that if a party wishes to attack a will, he must do so in the Probate Court. We have said this repeatedly. *Florey* does not say that the Act of 1893 conferred such jurisdiction.

It is respectfully submitted that *Richardson v. Green* is not distinguishable. It is still the law in this Circuit and should be followed. It accords with all of the applicable decisions of the United States Supreme Court and of the Courts of Appeals in other circuits. *Richardson* was approved by this Court in *Carrau v. O’Calligan*. No good reason for overruling *Richardson* has ever been advanced.

VIII. CONCLUSION.

It is respectfully submitted that the District Court manifestly had jurisdiction of the first three claims and the sixth claim for relief of the amended complaint. This being so, the District Court committed error when it dismissed the entire action because of its erroneous opinion that it had no jurisdiction over the fourth and fifth claims for relief. Actually, the court had such jurisdiction. It should have asserted its jurisdiction, because it was bound by the decision in *Richardson v. Green* as followed in *Carrau v. O’Calligan*, and by the Oregon cases as construed in *Richardson v. Green*. It is respectfully submitted that the judgment should be reversed with direc-

tions to the District Judge to deny the motion to dismiss
in toto.

Dated, March 4, 1959.

Respectfully submitted,

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(Appendix Follows.)



Appendix.



Appendix

Oregon Revised Statutes Relating to Wills and the Probate and Contest Thereof.

Chapter 114—Wills

114.010—*Term “will” includes codicil.* The term “will,” as used in this chapter includes all codicils.

114.020—*Who may make wills; limitations.* Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy.

114.030—*Will to be in writing; execution; attestation.* Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator.

114.040—*Person signing testator’s name to sign his own name as witness.* Any person who signs the testator’s name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator’s name at his request.

114.050—Refers to will of mariner or soldier.

114.060—Refers to nonresident’s will.

114.070—Refers to devise or bequest to trustee of existing trust.

114.110-114.150—Refer to revocation of wills.

114.210-114.270—Contain rules of construction.

114.310-114.370—Refer to witnesses as beneficiaries.

114.410-114.440—Refer to deposit of wills with the County Clerk before death and opening after death.

Chapter 115—Initiation of Probate or Administration

115.010—*Pleadings and mode of procedure.* No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

- (1) A citation to a party.
- (2) A verified petition of a party in interest.
- (3) A subpoena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees.

115.020—*Contents of petition to prove will or to appoint executor or administrator.* A petition to prove a will or for the appointment of an executor or administrator shall set forth the facts necessary to give the court jurisdiction and also state whether the deceased left a will or not and the names, age and residence, so far as known, of his heirs.

115.110—*Custodian of will must deliver to proper court; liability.* Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.

115.120—*Persons entitled to petition for proof of a will.* Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is lost or destroyed or beyond the jurisdiction of the state or is a nuncupative will.

115.130—*Order for production of will.* If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order.

115.140—*County in which proof of will shall be taken.* Proof of a will shall be taken by the probate court of a county as follows:

(1) When the testator, at or immediately before his death, was an inhabitant of the county, irrespective of the place he may have died.

(2) When the testator, not being an inhabitant of this state, died in the county, leaving assets therein.

(3) When the testator, not being an inhabitant of this state, died out of the state, leaving assets in the county.

(4) When the testator, not being an inhabitant of this state, died out of the state, not leaving assets therein, but where assets thereafter come into the county.

(5) When real property, owned by the testator at the time of his death is situate in the county, and no other probate court has gained jurisdiction under any of the preceding subsections of this section.

115.150—Refers to probate and proof of nuncupative wills.

115.160—Refers to establishment of foreign will.

115.170—*Testimony of attesting witnesses; affidavits; depositions.* (1) Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. If an attesting witness is outside the reach of a subpoena of the court having jurisdiction of the probate of the will such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

(2) However, upon motion of any person interested in the estate within 30 days after the order admitting the will to probate is made, or upon the discretion of the

court within that time, the court may require that the witness making the affidavit be produced before the court for further examination, or if the witness is outside the reach of a subpoena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

(3) However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

115.180—*Contest of will.* (1) When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest the same or the validity of such will; but, if a person entitled to contest the probate of a will or the validity thereof is laboring under any legal disability, the time in which he may institute such contest shall be extended six months from and after the removal of such disability.

(2) Any will made pursuant to ORS 114.060 may be contested and annulled within the same time and in the same manner as wills executed and proven in this state.

115.190—*Letters testamentary; administrator with the will annexed.* (1) When a will is proven, letters testamentary shall be issued to the persons therein named as executors, or coexecutors or to such of them as give notice of their acceptance of the trust and are qualified. If

all the persons therein named decline to accept, or are disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.

(2) Where a bank or trust company is named in a will as executor or coexecutor, and such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, letters of administration with the will annexed shall be issued to such converted, consolidated or purchasing company if it is otherwise qualified.

115.200-115.210—Refer to issuance of letters of administration where will declared inoperative and form of Letters Testamentary.

115.310-115.350—Refer to initiating administration and appointment of special administrators and form of Letters of Administration.

115.410-115.520—Refer to qualification and duties of executors and administrators.

115.990—Refers to penalties.

United States
Court of Appeals
For the Ninth Circuit

PETER CROCKETT JACKSON, a minor, by John E. Walker,
his Guardian ad Litem,
Appellant,

vs.

THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association; DAVID LLOYD DAVIES; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES, as Executors under the purported will and testament of MARIA C. JACKSON, deceased; THE UNITED STATES NATIONAL BANK, PORTLAND, OREGON, a national banking association, and DAVID LLOYD DAVIES and WILLIAM W. KNIGHT, as purported Trustees appointed by said purported last will and testament; and BLACK WHITE FOUNDATION, a corporation,
Appellees.

Brief of Appellees

Appeal from the United States District Court
for the District of Oregon

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PAUL P. O'BRIEN, CLERK

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United States
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PETER CROCKETT JACKSON, a minor, by John E. Walker,
his Guardian ad Litem,
Appellant,

vs.

THE UNITED STATES NATIONAL BANK, PORTLAND,
OREGON, a national banking association; et al.,
Appellees.

Brief of Appellees

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE
(See footnote below)

1. The Record

This action was commenced on August 22, 1956, by filing the original complaint (R. 6-20). In form, the com-

Note:

As used in this brief, unless otherwise indicated,
"Original complaint" means the complaint filed August 3, 1956 (R. 6-20)
as amended August 22, 1956 (R. 21-23).

"Amended complaint" means the First Amended Complaint filed January 2, 1958 (R. 55-75).

"Will" means the original will dated January 7, 1948 (R. 75-84) and the four codicils thereto (R. 84-98).

"App." means an appendix to this brief.

"Op. Br." refers to the Opening Brief of Appellants.

Italics in quoted matter are ours unless otherwise indicated.

plaint stated only a single claim. Rule 10 (f) . It alleged grounds for contesting parts (but not all) of the will of Maria C. Jackson on charges that those parts were not actually her will but were fraudulently drawn to reflect the purposes and desires of her son, Philip, and her legal advisers “and not her own” (R. 13; 16) .

The original complaint also alleged, as part of the charges of fraud, that Mrs. Jackson’s advisers induced her to set up an invalid trust from which they might benefit (R. 17) , and that they had failed to reveal the existence of a new will or codicil with provisions more favorable to appellant than those in the will (R. 17-18) .

Admittedly relying on *Richardson v. Green*, 61 Fed 423, as authority for Federal jurisdiction over Oregon will contests (Op. Br. 26) , appellant filed his original complaint to institute such a contest.

On motion of appellees (R. 24) , the action was dismissed by District Judge Mathis for want of Federal jurisdiction over the contest, but without prejudice (R. 112-113) . The reasons for the dismissal were stated by Judge Mathis in a Memorandum of Decision dated June 26, 1957 (R. 24-54) . In this Memorandum Judge Mathis observed that the original complaint asserted at least four separate claims or causes of action, although not separately stated (R. 27) . It will be noted that the presence of multiple claims in the complaint was first recognized by appellant some time after it had been pointed out by Judge Mathis.

On January 2, 1958, appellant filed a First Amended Complaint with substantially the same allegations as those in the original complaint, but rearranged and divided into six separate claims (R. 55-75) . Appellees renewed their

motion to dismiss and it was granted (R. 112-113). No further memorandum of this ruling was filed by Judge Mathis. However, the order of dismissal recited that "the first amended complaint presents in substance nothing more than a rearrangement of the claims asserted in the original complaint," and that "the motion to dismiss should be granted upon the grounds and for the reasons stated upon dismissal of the original complaint" (R. 112-113). The case is here on appeal from a judgment of dismissal entered pursuant to that order (R. 114-115).

2. The Facts

Appellant's version of the facts was set out in his two complaints and repeated, with some amplification, in his Opening Brief. We are assuming that the allegations of his amended complaint, in so far as they directly state ultimate facts rather than conclusions and argument, are to be taken as true for the purposes of this appeal. If the other or evidentiary facts stated so fully in appellant's brief have any relevancy on the jurisdictional issue presented on this appeal, which we doubt, then they should be considered, we think, in the light of the following additional facts appearing in the record:

(a) The original will was executed by Mrs. Jackson on January 7, 1948 (R. 84), some eight years prior to her death on February 3, 1956 (R. 6). During all of that time she admittedly was "of sound and disposing mind and memory" (R. 8; 56). In the 1948 will she left the bulk of her estate in trust with the income payable to Philip, her only living son, during his lifetime, and after his death in trust for the Jackson Foundation (R. 77-78), which is described in Article VI of the will (R. 79-82). Aside from Philip, her only living descendant was her great-grandson,

Peter, the appellant here (R. 8-9; 56). In the 1948 will Mrs. Jackson said that she was making no provision for Peter "because I know that he has been amply provided for in other ways" (R. 83). The truth of the quoted statement was not challenged in either of appellant's complaints.

(b) The charitable trust for the Jackson Foundation, alleged to have resulted from fraud perpetrated by Philip on his mother, is substantially the same as one created by Philip himself in his own will (R. 103-106).

(c) After the death of Philip, Mrs. Jackson, by the third codicil to her will (R. 89), added \$150,000 to the "ample" provision previously made for appellant (R. 83), and this bequest was confirmed by the fourth and last codicil (R. 97-98). Appellant accepts this bequest in his favor (Op. Br. 17-18), notwithstanding his assertion that there was a later will or codicil (R. 69-70) which, if it ever existed, may have cancelled or reduced the \$150,000 bequest.

(d) Appellant did not allege in his complaint, and does not contend in his brief here, that Mrs. Jackson ever intended to give appellant what he now seeks—substantially the entire estate immediately and absolutely.

3. The Claims

From the jurisdictional point of view, we think the most that properly can be contended for by appellant is that his complaint contains claims of two classes:¹

First, those which assert that the writings purporting to constitute Mrs. Jackson's will were not in fact her will. This class would include the charges of fraud (fourth

1. This classification does not include the so-called sixth claim, which actually is nothing more than a prayer for particular relief in the event that certain of the other claims should be established.

claim), undue influence (fifth claim), and the execution of a new will or codicil (third claim)². These claims will be referred to collectively in this brief as the “will contest”.

Second, those claims which challenge the validity of the will, or parts of it, on grounds which appear on the face of the will itself. This class would include the charges of indefiniteness and uncertainty (first claim) and violation of public policy by tax avoidance and creation of a perpetuity (second claim). These claims will be referred to in this brief, as they were by Judge Mathis (R. 50; 52), as “subsidiary claims”.

Until there has been a final determination of the will contest by a court of competent jurisdiction, the subsidiary claims will remain purely hypothetical; and if appellant should ultimately prevail in the will contest, the subsidiary claims would become moot.

Appellant in his brief here, as in his amended complaint, has shifted the emphasis reflected in his original complaint, and has presented the hypothetical or moot claims first. We shall reverse that order of presentation and discuss first the basic question of Federal jurisdiction over the will contest.

2. Appellant indicated that Judge Mathis, in his Memorandum of Decision, held that his court had jurisdiction of the third claim (Op. Br. 34-35). We do not so read the Memorandum (R. 47; 52).

PART I—THE WILL CONTEST

As indicated above, appellant attacks only a part (Article VI) of the will and accepts the remainder (R. 71; 74-75; Op. Br. 17-18). Assuming that this can be done in this instance, the attack on Article VI on the grounds asserted is nonetheless a will contest. *Allen's Estate* (1925), 116 Or 467, 499; 241 Pac 996, 1006; *Kelley's Estate* (1935), 150 Or 598, 627; 46 P2d 84, 95.

The amended complaint, like the original, set out a series of alleged frauds and deceptions on the part of Mrs. Jackson's advisers which, it is asserted, caused her to include Article VI in her will, and concluded:

"By so doing, they were able to and did overcome her volition to the extent that, although she desired to provide for plaintiff as aforesaid, she, nevertheless, executed a will which reflected the purposes and desires of Philip and defendant Davies and not her own" (R. 66).

Later, in the amended complaint, there are additional references to alleged fraud and undue influence whereby, it is alleged, that in Article VI

"the will and desires of defendant Davies after Philip's death were substituted for the will and desires of Mrs. Jackson" (R. 72).

These, in short, are plain allegations that Article VI was not the will of Mrs. Jackson. Consequently, this entire case involves only certain provisions which appellant claims never were any part of Mrs. Jackson's will.

The above quoted excerpts from the amended complaint, together with preceding allegations, show the grounds on which appellant claims that Article VI was not the will of

Mrs. Jackson. An attack on that Article based upon the grounds so indicated, is clearly a will contest in the legal sense as well as in common parlance. Fraud and undue influence are among the most common grounds for will contests in Oregon, and were involved in most of the will contests decided by the Supreme Court of Oregon, as shown by Appendix D to this brief. We contend that such attacks remain will contests no matter how they may be designated by the pleader, or how they may be commingled with other causes of action.

In our treatment of the jurisdictional issue, we shall first discuss the rules which determine Federal jurisdiction in probate matters (subject A below), and then take up their application here in view of the Oregon probate system (subject B below).

A—Federal Jurisdiction in Probate Matters

1. *Federal Courts do not have jurisdiction of will contests arising in states wherein such contests are proceedings in rem triable only in the probate courts as a part of the probate of the will.*

The historical background for this rule is summarized lucidly in Judge Mathis' Memorandum of Decision (R. 24-25). Specific applications of the rule are illustrated in the cases cited in the Memorandum. There are many additional cases to the same effect; but we think those discussed below, covering a span of over a century, are sufficient to indicate how firmly the rule has been established.

Gaines v. Chew (1844), 2 How 619 (cited often by appellant, Op. Br. 22, 31, 32, 36, 45, 46, 58, 60, 63), arose in Louisiana where the civil law prevails. It was a suit insti-

tuted in the Federal Court by Myra Gaines, as sole heir at law of Daniel Clark, to set aside proceedings for the probate of a will executed by Clark in 1811 on the ground that the 1811 will had been revoked by a later will executed by Clark in 1813 but fraudulently suppressed or destroyed by the defendants, who were named as executors of the 1811 will. The suit was instituted long after the probate proceeding had been closed and “the property of the decedent, both real and personal, had passed into the hands of purchasers” (2 How 649). The Supreme Court held that the Federal Court was without jurisdiction to set aside the probate of the 1811 will. (For further proceedings involving the Clark wills, see *Gaines v. Fuentes*, 92 US 10, discussed below.)

Broderick's Will (1874), 88 US 503, arose in California. It was a suit in equity to obtain relief much like that sought here—a decree declaring the will to be a forgery, setting aside the probate thereof, and charging as trustees those then in possession of the property of the estate. Following are excerpts from the opinion:

“As to the first point, it is undoubtedly the general rule, established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof.” (p. 509)

“The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills

on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." (pp. 509-510)

"There is nothing in the jurisdiction of the probate courts of California which distinguishes them in respect of the questions under consideration from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and all cognate matters usually incident to that branch of judicature." (p. 515)

Ellis v. Davis (1883), 109 US 485, which arose in Louisiana, involved the will of Sarah Ann Dorsey which had been admitted to probate by the state court having jurisdiction of probate matters. The suit was brought by next of kin in the Federal Court "to set aside the will as made under undue influence" (p. 486), to recover possession of certain lands, to obtain an accounting of rents and profits, and to cancel a deed made by the decedent during her lifetime. The suit was dismissed on demurrer by the lower court and its decree was affirmed by the Supreme Court. With respect to the will contest, the court said:

"It is contended, however, for the appellants that the bill ought to have been maintained, for the purpose of decreeing the invalidity of the will of Mrs. Dorsey and annulling the probate, so far at least as it gave effect to the will as a muniment of title.

"It is well settled that no such jurisdiction belongs to the circuit courts of the United States, as courts of equity; for courts of equity, as such, by virtue of their general authority to enforce equitable rights and remedies, do not administer relief in such cases. The question in this aspect was thoroughly considered and finally settled by the decision of this court in the case of *Broderick's Will*, 21 Wall. 503." (p. 494)

“In *Payne v. Hook*, 7 Wall. 425, it was decided that the jurisdiction of the circuit court of the United States, in a case for equitable relief, was not excluded because, by the laws of the State, the matter was within the exclusive jurisdiction of its probate courts; but, as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the *res*, which is the subject of the litigation, is entitled to administer it.” (p. 498). This case is discussed further below (post. . .).

Farrell v. O'Brien (1905), 199 US 89, 50 L Ed 101, 25 S Ct 727, arose in the State of Washington. It was a suit to set aside a nuncupative will theretofore admitted to probate in the state court. The Supreme Court reviewed its prior decisions, including several cited by appellant in the present case, and stated the jurisdictional question as follows:

“The question, therefore, reduces itself to a narrow compass, that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character or necessarily merely ancillary thereto, or do they confer upon the state courts general legal or equitable authority on the subject merely because of the existence of a controversy? That is to say, is a will contest under the laws of Washington an ordinary action or suit between parties or a special probate proceeding directly ancillary to or concerning the probate of the will?” (pp. 111-112)

The court then analyzed the Washington probate code, and observed:

“We are of the opinion that the sections in question authorize a proceeding for contest only before the court which has admitted the will to probate or rejected the

application made for probate, and that the authority thus conferred concerning the contest is an essential part of the probate procedure created by the laws of Washington, and does not, therefore, cause a contest, when filed, to become an ordinary suit between parties." (p. 114)

The opinion on the jurisdictional question concluded as follows:

"It follows that as the Circuit Court of the United States had no jurisdiction to admit a will to probate, or to entertain a pure probate proceeding, and as the remedy afforded by the laws of Washington to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit *inter partes*, the Circuit Court of Appeals correctly decided that the Circuit Court, although there was diversity of citizenship, was without jurisdiction of the cause so far as the bill sought a declaration of the non-existence of a will and the consequent nullity of the probate." (p. 116)

Sutton v. English (1918), 246 US 199, 62 L Ed 664, 38 S Ct 254, arose in Texas. The heirs brought suit to annul a will and partition the decedent's property. Upon analysis of the local statutes the Supreme Court concluded that in Texas such a proceeding was merely supplemental to the probate proceedings and cognizable only by the probate court, and hence that the controversy was not within the jurisdiction of the courts of the United States. The applicable rules were summarized as follows:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents *in rem*, matters of this character are not within the ordinary equity jurisdiction of the federal

courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a State, by statute or custom, gives to parties interested the right to bring an action or suit *inter partes* either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. *Broderick's Will*, 21 Wall. 503, 509, 512; *Ellis v. Davis*, 109 U.S. 485, 494, et seq.; *Farrell v. O'Brien*, 199 U.S. 89, 110; *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 43." (246 U.S. at 205)

The most recent decision of the Supreme Court, so far as we can determine, is *Wilson v. Simler* (1955), 350 US 892, 100 L Ed 98, 76 S Ct 153, reh. den. 350 US 943. Since the case was disposed of by a short *per curiam* opinion, it is necessary to review the lower court decisions.

Simler, as an heir at law of Birdine Fletcher, deceased, brought suit in the United States District Court of Oklahoma under the Federal Declaratory Judgments Act, to obtain a determination of the validity of a devise in the decedent's will to Sisters of St. Francis, an incorporated religious organization, on the ground that the devise violated an Oklahoma statute which allegedly prohibited such

an organization from holding real estate outside of an incorporated city or town. The District Court held (110 F Sup 761) that under the Oklahoma law the devise, in any event, would not be void but only voidable, and that plaintiff had no standing to contest its validity, and therefore dismissed the suit. However, the District Court held that "although the Will in question is now being probated in the state court doubtless this court has authority to *construe* the provisions of the Will", citing *Ferguson v. Patterson*, 191 F2d 584 (110 F Sup 762-3).

On appeal the Court of Appeals reversed and held the devise to be invalid (210 F2d 99). It concluded that the federal courts had jurisdiction because the same court in a prior decision (*Ferguson v. Patterson, supra*) had "reached the conclusion that the district courts in Oklahoma were vested with jurisdiction to entertain an original proceeding to determine the validity of a provision contained in a will, and that therefore a United States court in that state was clothed with like jurisdiction in an action of that kind, diversity of citizenship with the requisite sum in controversy being present." (210 F2d 102)

The Supreme Court granted certiorari and disposed of the case in this brief memorandum opinion, quoted in full:

"Per Curiam: The petition for writ of certiorari is granted. The judgments of the Court of Appeals are vacated and the judgments of the District Court reinstated. *Sutton v. English*, 246 U.S. 199. See *Markham v. Allen*, 326 U.S. 490, 494; *Pufahl v. Estate of Parks*, 299 U.S. 217, 256. Mr. Justice Black dissents." (350 U.S. 892-3)

Express reliance on the cases cited in the *per curiam* opinion indicates that dismissal of the case was not ordered

on the ground assigned by the District Court, but on the want of jurisdiction of the subject matter.

Richardson v. Green (1894) , 61 Fed 423, relied upon by appellant in instituting this suit in the Federal Court (Op. Br. 26) and discussed at length in his brief (Op. Br. 80-98) , recognized the general rule to be as stated in proposition 1 above but concluded that the *Richardson* case came within the exception stated in proposition 2 below. This conclusion, we contend, resulted from a misunderstanding of the Oregon probate system (post, pp. 38-41) , and not from any intentional departure from the basic principles previously established in the *Broderick* case.

2. *Federal Courts, when diversity exists, may take jurisdiction of a will contest arising in a state wherein such a contest is an independent plenary suit in personam and not a part of the probate proceeding.*

This qualification or exception to the general rule was pointed out in *Farrell v. O'Brien*, cited above. After reviewing prior decisions, the court stated these two general rules:

“First. That, as the authority to make wills is derived from the State and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

“Second. That where a state law, statutory or customary, gives to the citizens of the State, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity the courts of the United States in administering the rights of citizens of other States or aliens will enforce such remedies.” (199 US at 110)

The exception was applied in *Blacker v. Thatcher* (CCA, 9th; 1944) , 145 F2d 255, heavily relied upon by the appellant here. (Op. Br. 23, 25, 36, 37, 40, 42, 44, 63, 72.) There this court recognized that

“in states where the probate proceeding is purely one *in rem* and not a suit *inter partes*, sustainable in a court of equity, they (courts of the United States) can not entertain jurisdiction over a bill to set aside the probate of a will” (p. 258)

but pointed out that in Montana, where the will was probated, “the probate of an estate is a proceeding in a court of general jurisdiction” and that it “embraces proof of heirship and the contest of wills * * *” (p. 257) .

3. *After the administration of an estate has been completed in the probate court and the proceeding has been closed, Federal courts have jurisdiction to set aside the probate decree for fraud if such relief could be obtained by an independent plenary suit in the state courts.*

Gaines v. Fuentes (1875) , 92 US 10, involved the two Daniel Clark wills referred to in *Gaines v. Chew* above. In 1855, Myra Gaines petitioned the Louisiana state probate court to probate the 1813 will, and the petition was granted *ex parte*. Subsequently, she instituted in the Federal Court several suits to recover properties formerly owned by Clark to which she succeeded if the 1813 will were valid. To successfully defend such suits, the defendants would have to challenge the probate of the 1813 will, which they undertook to do on the ground that the testimony on which the will had been admitted to probate was insufficient and false. They concluded, however, that they were “unable to contest the validity of the alleged will so long as the

decree of probate remains unrecalled" (p. 11). They therefore instituted the present action in a Louisiana state court which "is invested with jurisdiction over the estates of deceased persons" (p. 10). Myra Gaines then sought to remove the action to the Federal Court but her application for removal was denied. The state court ultimately entered a decree annulling the 1813 will and revoking its probate. The case was taken to the Supreme Court on a writ of error to review the order denying the application to remove. The Supreme Court reversed, saying:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony. There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not there designated suits in equity. But they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original process in a Federal court, where the parties are, on the one side, citizens of Louisiana, and, on the other, citizens of other States." (pp. 20-21)

"In the case of *Broderick's Will*, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and, whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject

of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts. But that such jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties." (p. 21)

Ellis v. Davis (1883), 109 US 485, cited and quoted above, also involved the law of Louisiana. It quoted from *Gaines v. Fuentes*, *supra*, and added:

"As that was a case in which the sole question decided was the right of the defendant to remove the cause from the State court to the Circuit Court of the United States, under the act of March 2d, 1876, 14 Stat. 558, it was assumed, and not decided, that the said suit brought in the State court was one which, under the laws of the State, its courts were authorized to entertain for the purpose of granting the relief prayed for. The point decided was, that if it were it might properly be transferred to a court of the United States.

"It remains, therefore, in the present case to inquire whether the complainants are entitled, under the laws of Louisiana, to draw in question, in this mode and with a view to the decree sought, the validity of the will of Sarah Ann Dorsey and the integrity of its probate.

"An examination of the decisions of the Supreme Court of Louisiana on the subject will disclose that a distinction is made in reference to proceedings to annul a will and its probate, according to the objects to be accomplished by the judgment and the relation of the parties to the subject. If the administration of the succession is incomplete and *in fieri*, and the object is to alter or affect its course, the application must be

made to the court of probates, which, in that case, has possession of the subject and exclusive jurisdiction over it. If, on the other hand, the succession has been closed, or has proceeded so far that the parties entitled under the will have been put in possession of their rights to the estate, then the resort of adverse claimants must be to an action of revendication in the courts of general jurisdiction, in which the legal title is asserted as against the will claimed to be invalid, making an issue involving that question.” (pp. 498-499)

4. *Federal courts, when diversity exists, may take jurisdiction of controversies involving the interpretation or legal effect of a will, or claims of creditors or legatees and the like, which do not require a determination of whether a purported will is or is not in fact the will of the decedent.*

The distinction between this class of controversies on the one hand, and will contests on the other, runs through all of the leading cases on Federal jurisdiction in probate matters. It was recognized in most of the Federal cases cited in appellant’s brief, of which the following are examples.

Woods v. Paine (CCD, R I; 1895), 66 Fed 807 (cited by appellant, Op. Br. 32, 36, 38, 53, 57, 62, 63), was a suit in equity instituted in the Federal court to declare void a charitable trust created by the decedent’s will. The bill alleged that the will had been admitted to probate by the state probate court of Rhode Island, that the decree of probate had been affirmed by the supreme court of that state, and that “all legal proceedings in said matter are now ended in the state courts” (p. 807). No attempt was

made to contest the will in the Federal court. The District Judge said (p. 808) :

“The will having been established by authority competent for that purpose, there seems to be no doubt of the jurisdiction of this court to determine questions as to interpretation thereof in this case, in which the complainant is a citizen of Michigan, and all the respondents are citizens of Rhode Island. Compare *In re Cilley*, 58 Fed 977.” (*Note*: The *Cilley* case held that the Federal court had no jurisdiction over a will contest.)

The court, however, sustained a demurrer to the bill on the ground that the charitable trust clearly appeared to be valid under the law of Rhode Island (p. 809) .

Spencer v. Watkins (CCA, 8th; 1909) , 169 F 378, was a suit in equity instituted by certain heirs to declare invalid a charitable bequest provided for in the decedent's will and to establish their right as such heirs to share in the property. No will contest was involved. The character of the suit is shown by the following excerpts from the opinion:

“The suit was brought after the ordinary matters incident to probate and administration had been fully disposed of and when final distribution was at hand, and its object was to have the bequest of the residuary estate declared contrary to the laws of the state relating to the disposition of property for charitable purposes, and to secure for the complaining heirs their respective shares thereof upon the ground that the deceased had died intestate as to the estate in question.” (p. 382)

“This was a civil suit in equity, within the jurisdiction of the Circuit Court. It should be added that in purpose and effect it no more interfered with the probate court in its rightful custody of the estate than would an ordinary action and judgment at law in the Circuit Court establishing a claim or demand on con-

tract.” (pp. 382-383). This case is discussed further below (p. 54).

Markham v. Allen (1946), 326 US 490, 90 L Ed 256, 66 S Ct 296 (cited by appellant, Op. Br. 22, 25, 31, 35, 40, 63), was a suit brought by the Alien Property Custodian to determine whether he as such Custodian had succeeded to the interests of certain German legatees under the decedent’s will. The will had been probated in the State Superior Court, and the estate was in the course of administration under the will when the suit was brought (326 US 492). The judgment of the District Court declared that the Custodian “had acquired the interests of the German Nationals in the estate of the decedent” and was entitled to receive same upon final distribution (326 US 493). No will contest was involved. In holding that the suit was within Federal jurisdiction, the Supreme Court said:

“It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and Sec. 24 (1) of the Judicial Code, which is that of English Court of Chancery in 1789, did not extend to probate matters. * * * (citing cases)

“But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits ‘in favor of creditors, legatees and heirs’ and other claimants against a decedent’s estate ‘to establish their claims’ so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. * * *” (citing cases) (p. 494)

The propositions stated above and the supporting authorities are sufficient, we believe, to define with reasonable certainty the limits of Federal jurisdiction in probate matters. They make it clear that the Federal courts would not have jurisdiction of an Oregon will contest, even between citizens of different states, unless such a contest is an independent suit *in personam* apart from the probate proceeding itself.

B—The Oregon Probate System

Appellant strived to describe the Oregon probate system so as to support the conclusion that will contests in Oregon are plenary suits *in personam* triable in its courts of equity. The description, however, is inaccurate in so many respects as to require a general explanation of the system in order to disclose the error in appellant's conclusion.

1. *Jurisdiction of Oregon Probate Courts*

The probate courts in Oregon were established by the State Constitution, which became effective upon the admission of Oregon into the Union in February, 1859. The pertinent provisions are set out in Appendix A to this brief. The Constitution vested in the county courts "the jurisdiction pertaining to probate courts" (Art. VII, §12). The probate jurisdiction thus vested in the county courts could not be taken away by the Legislature. *State v. McDonald* (1909), 55 Or 419, 430; 104 Pac 967, 971; 106 Pac 444.

Through most of Oregon history, probate jurisdiction remained exclusively in the county courts. This is significant because under the Constitution such courts had no general jurisdiction in either law or equity except "such civil jurisdiction not exceeding the amount or value of five

hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law" (Art. VII, §12). This was substantially the jurisdiction normally vested in justices of the peace during that period. Later, when the Legislature (under the 1910 amendment to Article VII, see App. A) by a series of acts transferred probate jurisdiction to the circuit courts, the jurisdiction so transferred was kept as separate and distinct from the general jurisdiction of the circuit courts as if such probate jurisdiction were still vested exclusively in the county courts (post, pp. 48-50).

The probate courts, though following the procedure in equity except as otherwise prescribed (ORS 115.010), have no general equitable jurisdiction whatever:

Burnside v. Savier (1876), 6 Or 154, 156; *Weill v. Clark's Estate* (1881), 9 Or 387, 391; *Richardson's Guardianship* (1901), 39 Or 246, 249; 64 Pac 390, 391; *Dunham v. Siglin*, (1901), 39 Or 291, 296; 64 Pac 661, 662; *Roach's Estate* (1907), 50 Or 179, 186; 92 Pac 118, 121; *Hillman v. Young* (1913), 64 Or 73, 81-82; 127 Pac 793, 795; *Burke's Estate* (1913), 66 Or 252, 256; 134 Pac 11, 13; *Elder's Estate* (1938), 160 Or 111, 115; 83 P2d 477, 478; *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666, 672; 182 P2d 969, 977-978; *Estate of Ott* (1951), 193 Or 262, 271-273; 238 P2d 269, 273; *Arnold v. Arnold* (1952), 193 Or 490, 502; 237 P2d 963, 969; *Putnam v. Jenkins* (1955), 204 Or 691, 697; 285 P2d 532, 535.

Conversely, the courts of general jurisdiction have no probate powers:

Wilamette Falls Co. v. Gordon (1876), 6 Or 176, 180-182; *Tustin v. Gaunt* (1873), 4 Or 305, 308-309; *State v. McDonald* (1910), 55 Or 419, 430; 104 Pac 967, 971-972;

Mansfield v. Hill (1910) , 56 Or 400, 408; 107 Pac 471, 474; *Stevens v. Myers* (1912) , 62 Or 372, 412; 126 Pac 29, 30-35; *Wilson v. Hendricks* (1940) , 164 Or 486, 492; 102 P2d 714, 716; *Florey v. Meeker* (1952) , 194 Or 257, 279; 240 P2d 1177, 1186.

We need cite only a few examples to show how carefully the Supreme Court has kept the two classes of courts within their respective jurisdictions. *Mansfield v. Hill* (1910) , 56 Or 400; 107 Pac 471, was a suit in equity having for its main purpose (as did *Richardson v. Green*) the cancellation of a deed and a will of the decedent because of his alleged mental incapacity. With respect to the will, the court said:

“Plaintiff seeks in this suit to have the will of Claude H. Mansfield cancelled on the ground that the testator lacked mental capacity to make it at the time of its execution, but the probate of the will in the *county court* is conclusive upon the plaintiffs in this suit, which is a collateral attack: *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362; 11 L.R.A. 155; 23 Am. St. Rep. 95). The constitution gives to the *county court* jurisdiction pertaining to probate.”

Another and more recent example of proceedings to cancel a deed and a will because of the alleged mental incapacity of the grantor-testator is shown in *Keenan's Estate* (1956) , 208 Or 223, 300 P2d 778. In that case the moving parties proceeded along the conventional lines prescribed by the Oregon statutes and decisions of the Oregon Supreme Court. They contested the will in the county court by proceedings under the 1893 Act (App. C) , and brought suit in the Circuit Court to cancel the deed. While the two cases were consolidated for hearing in the Circuit Court on the issue of mental capacity, nevertheless they were

treated as two separate cases throughout. On appeal, the Supreme Court, sitting as a probate court, sustained the will; and while sitting as a court of equity, it cancelled the deed.

Another series of cases showing the sharp line of division between the respective jurisdictions of the probate courts and the courts of general jurisdiction, even though part of the subject matter may be within the jurisdiction of the one and a part under the jurisdiction of the other, are those involving wills alleged to have been made in violation of contracts. A recent example is *Flore v. Meeker* (1952), 194 Or 257; 240 P2d 1177, which was a suit to enforce specific performance of a contract between the decedent and his wife to make joint wills under which the plaintiffs would be the chief beneficiaries. The wife died first, her husband remarried, and then executed a codicil to the joint will whereby he made his second wife the chief beneficiary. After his death, the will and the codicil were probated in the usual manner. In the suit for specific performance the plaintiffs (appellants) claimed that the codicil was not properly executed—a contention which, if sustained, would have given the plaintiffs all of the relief sought by them in the suit for specific performance. But the Supreme Court held that the question so raised could not be determined in the suit in equity, and said:

“* * * Any issue relative to the sufficiency of the codicil’s execution was properly determinable in the court of probate. On April 26, 1948, more than six months prior to the institution of this suit, the probate court found that the second codicil was executed in compliance with the statutory requirements. Sections 18-201 and 18-401, OCLA. If appellants’ contention had any merit, it should have been seasonably addressed to that court after the date of the order admit-

ting the codicil to probate. Section 19-208, OCLA, as amended by Ch. 185, Oregon Laws, 1945. This they did not do and are now barred. We must, therefore, accept the codicil as being statutorily sufficient as to form and as an adequate implement to modify the will it seeks to change.” (194 Or 279-280; 240 P2d 1187).

(Note: Section 19-208, to which the court referred, is now ORS 115.180, and was originally section 4 of the 1893 Act relating to will contests, which is quoted in full in Appendix B.)

On the other hand, it is settled that the *probate court* has no jurisdiction to determine the validity or effect of a contract to make a will, but must probate the will as written, if otherwise proper, even though it may violate a valid contract enforceable by a suit in equity:

Burke's Estate (1913), 66 Or 252, 256-257; 134 Pac 11, 13; *Ankeny v. Lieuallen* (1942), 169 Or 206, 218; 113 P2d 1113, 1117; *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666; 182 P2d 969, 977-978; *Branchflower v. Massey* (1949), 187 Or 40, 47-48; 208 P2d 341, 345.

2. General Character of Probate Proceedings in Oregon

In 1862 the Legislature adopted a civil code which was set out in General Laws of Oregon, 1845-1864, compiled by Judge Matthew P. Deady. The 1862 Act contained a chapter on Wills (pp. 935-940) and a Probate Code (pp. 410-440), which have continued ever since without substantial change in basic outline. The principal provisions with which we are now concerned are set out in Appendix B to this brief. Except for ORS 115.180 (the 1893 Act discussed below), the statutes quoted in Appendix B are now in substantially the same form as when first enacted in 1862.

From the beginning it has been recognized in Oregon that the right to dispose of property by will, as well as the right of an heir (like plaintiff) to take property by descent, is purely statutory. *McDemid v. Bourhill* (1921), 101 Or 305, 312; 199 Pac 610, 912; *Lewis' Estate* (1939), 160 Or 486, 497; 85 P2d 1032, 1037. On that premise, the statutes of Oregon prescribe the qualifications of those who may make a will (ORS 114.020), the form, and manner of execution, of wills (ORS 114.030 and 114.040), and the methods by which a will may be revoked (ORS 114.110) and the effect of a revocation (ORS 114.120).

The statutes also prescribe the probate procedure necessary to make the will effective (ORS 115.010 to 115.200). This procedure is applicable not only to a will which can be produced for probate, but also to a will which has been "lost or destroyed" (ORS 115.120). It would apply, for example, to proof of the alleged "new will or codicil", if any existed, referred to in the complaint in this case (R. 69-70).

The procedure thus prescribed is exclusive; the will cannot be proved in the first instance in any tribunal other than the probate court. *Willamette Falls v. C. & L. Co.* (1876), 6 Or 176, 181. The rule in Oregon, unlike that in England, is that the will need not be re-proved in a court of general jurisdiction even though it may transfer title to land. *Jones v. Dove* (1877), 6 Or 189, 190-191.

After a will is so proved in the probate court, the order of that court admitting the will to probate is *res adjudicata* and immune to collateral attack in any other court. *Russell v. Lewis* (1870), 3 Or 380, 384; *Hubbard v. Hubbard* (1879), 7 Or 43, 44; *Brown v. Brown* (1879), 7 Or 286,

299-300; *Mansfield v. Hill* (1910), 56 Or 400, 408; 107 Pac 471, 474; *Thomas Kay Woolen Mills Co. v. Sprague* (DC Or 1919), 259 Fed 338, 342.

The statutes authorize and direct the probate court, when the administration of an estate is otherwise completed, to order "the payment of legacies and the distribution of the remaining proceeds of the personal property among the heirs or other persons entitled thereto" (ORS 11.310). Such a decree of distribution is likewise immune to collateral attack in any other court. *State v. O'Day* (1902), 41 Or 495, 499-501; 69 Pac 542, 544. And, as noted below, the probate code contains specific provisions for the contesting of wills (ORS 115.180).

It may be said by way of summary that Oregon created the right to transfer property by will, but only in the manner specifically prescribed by statute; that this right is also conditioned upon proof of the will, in a special type of court and in accordance with special procedures followed only by that court; and that such proceedings in that court (except upon appeal) are binding not only on all of the interested parties but also on all other parties and courts. In short, from the inception of the will to final distribution under it, every step is controlled by special statutes designed for application in one continuous process in one court.

3. *Pleadings and Process in the Probate Courts*

Oregon probate proceedings are governed by separate and special rules of pleading and process applicable only to them. Their special character becomes more readily apparent after first noting the procedure in ordinary suits and actions.

For plenary suits and actions, the original Oregon Code of 1862 adopted the code system of pleading and practice (Oregon Laws, 1843-1872, §§ 1 to 105) and has followed it, with minor variations, ever since (ORS 16.010 to 16.740). Oregon still maintains the old distinction between actions at law and suits in equity. (ORS 11.010 and 11.020; *Tooze v. Heighton* (1916), 79 Or 545, 552; 156 Pac 245, 247; *Spores v. Maude* (1916), 81 Or 11, 14; 158 Pac 169, 170-171.) While both are tried in the same court, their distinctive characteristics are as carefully preserved as if they were heard in different forums. (*Van de Wiele v Garbade* (1912), 60 Or 585, 589; 120 Pac 752, 753-754.) Both are plenary in character and must originate in courts of general jurisdiction. Both are commenced by the filing of a complaint (ORS 15.020), and their initial process is a summons (ORS 15.020). The usual provisions are made for answers, demurrers, motions, etc., as to both. The pleadings and procedure in both law and equity cases are the same except for such variations as may be necessitated by inherent differences in the types of relief sought.

For the probate courts, on the other hand, an entirely different type of procedure, summary in character, is prescribed. The statute provides that "the court exercises its powers by means of:

- (1) A citation to the party.
- (2) A verified petition of a party in interest.
- (3) A subpoena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees." (ORS 115.010)

This limitation on the means by which probate courts may exercise their powers is accompanied, however, by the following general provisions in the same section:

“No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute.”

This general provision, as will be noted later, was only a succinct way of saying that in those incidental procedural matters (such as mode of trial, exceptions to court rulings, and the like) wherein the practice in suits in equity differs from that in actions at law, the probate court is to follow the equity practice.

Appellant has sought to discount the clear statutory distinction between probate proceedings and suits in equity by referring to the historical use of such terms as “petition”, “citation”, “subpoena”, etc., in equity practice (Op. Br. 70-71). Admittedly, the Oregon Legislature could have used such terms, with their ancient meaning, in prescribing procedure in suits in equity; but the important fact here is that the Legislature did not do that. By using different terms in prescribing the two different types of procedure, the Legislature indicated clearly that the two procedures were not intended to be the same. The general reference in ORS 115.010 (quoted above) to procedure “in the *nature* of a suit in equity as distinguished from an action at law” will be discussed later under another heading (post, pp. 49-50).

4. *Proof of Wills in Common Form and in Solemn Form*

Oregon still maintains the ancient distinction between proof of wills in *common* form and proof in *solemn* form. The common form suffices in the absence of a contest; the solemn form must be used if the will is contested.

The first step in probating a will is the filing of a petition for its probate (ORS 115.020). Upon the ex parte testimony of the subscribing witness, given either orally or by affidavit,¹ the will may be admitted to probate and letters testamentary issued to the executor (ORS 115.170 and 115.190). The executor must, "immediately after his appointment, publish notice thereof" in a newspaper once a week (or oftener if the court so directs) for four successive weeks (ORS 116.505), which serves as public notice of the probate of the will. In the absence of a contest, the foregoing constitutes the proof of the will. This process is referred to as proof in *common* form. In the great majority of cases, no further probate ever is required.

But at any time within six months after the will has been probated in common form (or later if the contestant is laboring under a legal disability), any person interested may contest the will or the order admitting it to probate (ORS 115.180). In the event of such a contest, the statute provides, "the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity" (ORS 115.170 (3)). Proof of the will in this manner is referred to as probate in *solemn* form.

1. A witness who testifies by affidavit may be required, at any time within the next 30 days, to appear and testify orally in the probate court, or, if outside the state, to testify by deposition taken in the usual manner. ORS 115.170 (2). Use of affidavits instead of oral testimony was first provided for in Chapter 97, Oregon Laws, 1921, now codified as ORS 115.170.

The net effect is that whenever a will is contested, the probate in common form is nullified and the proponent must then re-prove the will *de novo* in solemn form just as if there had been no prior probate of the will. This was explained in the early case of *Hubbard vs. Hubbard* (1879), 7 Or 42, 44-45, as follows:

“It is claimed by counsel for appellants that where a will has been probated ‘in common form’, or by proceedings wholly *ex parte*, as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to reprobate the same *de novo*, by original proof, in the same manner as if no probate thereof had been had. This proposition we think is correct, if the allegations are sufficiently broad to question the validity of the will, and the competency of the proof as to its execution. In every such proceeding the *onus probandi* lies upon the party propounding the will; and he must prove every fact, which is not waived or admitted by the pleadings, necessary to authorize its probate in the County Court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative.”

The *Hubbard* case was followed by a series of others to the same effect. *Luper v. Werts* (1890), 19 Or 122, 23 Pac 850; *Mendenhall's Will* (1903), 43 Or 542; 73 Pac 1033; *Sturtevant's Estate* (1919), 92 Or 269, 178 Pac 192, 180 Pac 595; *Wendl v. Fuerst* (1913), 68 Or 283, 136 Pac 1; *Riggs' Estate* (1926), 120 Or 38, 250 Pac 753; *Davis' Will* (1943), 172 Or 354, 142 P2d 143; *Southman's Estate* (1946), 178 Or 462, 168 P2d 572. In *Johnson's Estate* (1921), 100 Or 142, 159; 196 Pac 385, 390, the court referred to the cases up to that time as follows:

“Since the early case of *Hubbard v. Hubbard*, 7 Or. 43, it has been the rule that where a will has been pro-

bated in common form, and its validity has been attacked by direct proceedings, it is incumbent upon the person propounding the will to re-probate the same by original proof in the same manner as if no probate thereof had been had."

5. *A Will Contest Is a Part of the Probate Proceeding*

A will contest in Oregon is only a means of requiring probate of the will in solemn form. Once the *ex parte* probate is challenged by the contest, the proponent must prove the will in solemn form before the only court authorized to take such proof, namely, the probate court (*Mansfield v. Hill* (1910), 56 Or 400, 408; 107 Pac 471, 474), in which all Oregon will contests have been tried since the Oregon code was adopted in 1862. (See App. D)

In effect, the contest is nothing more than a denial of what the proponent is required to prove to entitle the will to probate. As stated by the Supreme Court of Oregon in *Stevens v. Myers* (1912), 62 Or 372, 412; 121 Pac 434; 126 Pac 29, 34:

"No matter whether the proceeding is for probate of the will in common form or in solemn form, whether *ex parte* or contested, whether it was commenced in the probate court or the district court of the territorial regime, or in the present day county court, all that is accomplished in any of the proceedings in question is that the proponent, with the affirmative of the issue resting upon him, either succeeds or fails in his attempt to prove the will. From whatever point we view the case, it is still the probate of a will—neither more nor less."

It follows that so far as contested wills are concerned, the only probate involved is the one made in solemn form. It is not merely a *part* of the probate; it becomes, by the

contest, *the probate* of the will. Nothing to the contrary ever has been said, or even suggested, by the Supreme Court of Oregon.

If there ever was any basis for contending that an Oregon will contest is something separate and apart from the probate of the will, we submit that any such basis was completely destroyed by the 1921 Act (Ch. 97, Or. Laws, 1921, now ORS 115.170) cited above (p. 30). This act consisted of a single section covering probate of wills in common form, contests of wills, and probate in solemn form—all treated as part of a single probate proceeding. The Act plainly negatives any possible suggestion that the parties are expected to jump back and forth between the probate court and the circuit court as the proceeding progresses from one stage to another.¹

6. *The Probate of a Will, Including Any Contest of It, Is a Proceeding in rem*

The proposition that the probate of a will is a proceeding *in rem*, is too well established to require citation of supporting authority. Appellant seems to recognize this but undertakes to segregate a will contest from the rest of the probate process and give it a different classification—a proceeding *in personam*. This is justified, he contends, by certain peculiarities in Oregon probate law. But before examining the Oregon law, let us first take note of the reasons why will contests are generally regarded as proceedings *in rem*.

1. Appellant cites the provision that in proving the will in solemn form the facts shall not be proved by affidavit "but in the *same manner* as such questions of fact are proved in a suit in equity", and treats the quoted language as if it said that the facts shall be "tried *in a suit in equity*" (Op. Br. 67).

Some of the reasons are stated in the decisions of the Supreme Court of the United States in the cases cited above. See, for example, *Broderick's Will* (1874), 88 US 503, 509, in which the court said:

“* * * the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of court having jurisdiction. The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of injustice and fraud; and that the result attained should be firm and perpetual.” (88 U.S. 509)

Even in jurisdictions in which will contests are treated as separate independent suits, the great majority of the courts hold that the contest, like the original probate, is a proceeding *in rem*. The general rule was thus stated in Bancroft's Probate Practice (2nd Ed.):

“The proceeding (will contest), although called a ‘contest’ is still neither more nor less than one to probate a will. The proceedings are, however, *in rem*. They are proceedings to determine the legal status of a written instrument. The world is bound by them and all parties in interest may be, or are, parties.” (Vol. I, Sec. 162, pp. 392-393)

The reasoning which supports the quoted conclusion can be found in numerous cases. One example is *Mitchell v. Nixon*, (CCA 5; 1952), 200 F2d 50, a suit to contest a will which had been admitted to probate in a state *Probate*

Court of Arkansas. The Arkansas statutes provided that a will so admitted to probate could be contested by a suit in the state *Circuit* Court. Plaintiffs, being non-residents, attempted to contest the will by a suit in the Federal District Court, which dismissed the suit for want of jurisdiction over the subject matter. The Circuit Court of Appeals affirmed. After referring to the Arkansas statutes, the court said:

“These statutory provisions demonstrate that the contest of a will subsequent to its probate, is but an extension of the probate proceeding—a proceeding not *inter partes* but *in rem*. (citing cases) It is true that some of the cases do contain language which gives rise to an inference that a proceeding *in rem* to contest a will partakes, at least to some extent, of the nature of a suit *inter partes*; however, the clear weight of authority fully sustains the proposition that the contest which may be instituted following admission to probate is but an extension of the time of contest and in effect, but another form of defense to the probate. Obviously there is no sound reason why the probate of a will should be a proceeding *in rem*, and a defense against its probate should be considered as a proceeding *inter partes*.” (p. 52)

Likewise, the Missouri statutes provide for the initial probate of a will in the *Probate* Court, and for a contest of the will by suit in the *Circuit* Court. Nevertheless, the will contest is held to be a proceeding *in rem*. *McCrary v. Michael* (Mo 1937), 109 SW2d 50, 51; *Miller v. Munzer* (Mo 1952), 251 SW2d 966, 971; *Davis v. Davis* (Mo 1952), 252 SW2d 521, 522. Following are excerpts from the opinions in these cases:

“A will contest is a proceeding *sui generis*. It is a suit *in rem*. The sole question to be determined is ‘will, or no will’. It has the effect of vacating the probate in

common form, such as the ex parte proof of wills in the probate court." (109 SW2d 51)

"A will contest is an *in rem* proceeding (citing cases) which operates on the res—the will. Once instituted it cannot be dismissed, but must proceed to an adjudication. (citing cases) The adjudication either establishes or destroys the will, and that adjudication is final." (251 SW2d 971)

"The right to contest a will is entirely statutory. * * *

The proceeding is *in rem* to determine the status of the paper writing, whether or not it is the will of the deceased." (252 SW2d 522)

A will contest is a proceeding *in rem*, not because of the type of court in which it is instituted, but because of the nature of the issue to be determined—"will or no will". These reasons apply with special force in Oregon where the contest is merely a contention of "no will" in the process of proving the will.

But we need not pursue these lines of reasoning any further because the *in rem* character of a will contest in Oregon is established by statute. ORS 43.130, dealing with the subject of *res judicata*, provides:

"The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:

"(1) In case of a judgment, decree or order against a specific thing or in respect to the *probate of a will* or *the administration of the estate of a deceased person* or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the *will* or *administration*, or the condition or relation of the person.

“(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive *between the parties*, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.”

The quoted section was §723, Hill's Annotated Laws of Oregon (2nd Ed.; 1892), the annotations having been prepared by William Lair Hill, one of the ablest and best known lawyers of the period. Following §723 was the following annotation:

“Subdivision 1 of this section defines the cases in which a judgment will be conclusive as a judgment *in rem*, while subdivision 2 defines the cases in which only parties and privies are bound.” (Vol. I, page 571)

Appellant, in effect, asks this court to take the words “the probate of a will” out of sub-section 1, add to them the words “in common form”, and then place them in sub-section 2 (Op. Br. 78). The result would be that the only decrees of probate which would be binding on the world would be those based on proof of the will in common form—a result so at variance with established concepts as to condemn the process by which it was reached. In any event power thus to revise the statute does not rest in the judiciary, either State or Federal.

7. *Richardson v. Green* (1894), 61 Fed 423, *Is Not Controlling in This Case*

This case was cited by appellant so many times that he gave page references only as “passim” in his table of cases (p. IV). This is understandable because Judge Knowles'

opinion in the *Richardson* case, and subsequent dictum based upon it, constitutes the only authority which has been found to support appellant's major propositions with respect to the character of will contests in Oregon. We shall therefore comment upon it, although, as pointed out later, the principal jurisdictional questions there involved have been settled in the interim.

Judge Knowles, throughout his opinion, recognized the basic proposition that the Federal courts do not have jurisdiction of a will contest unless it can be instituted as an independent suit *in personam* apart from the probate proceeding. The error in his opinion, as we view it, resulted from his misunderstanding of Oregon probate procedure. For example, he found as *facts*:

(a) That "there was no law in Oregon, when this action was commenced (sometime prior to August 29, 1892; 56 Fed. 384), to warrant any contest upon the validity of a will at the time same was being probated" (p. 482), overlooking the fact that since 1862 the county courts had been given jurisdiction to "take proof of wills" (ORS 5.040 (1)), which included proof both in common form and in solemn form, the latter being used in the event of a contest.

(b) That a decree on a will contest is "binding only on the parties thereto" (p. 428), overlooking ORS 43.130 (quoted above), which is directly to the contrary.

(c) That "a *suit* in the *county court* of Oregon in such matters * * * is a customary exercise of jurisdiction" (p. 428), when in fact no county court of Oregon ever was given jurisdiction of such a suit by the Constitution (App. A) or by statute (App. B) or ever had assumed to exercise any such jurisdiction. See cases cited above (pp. 22-23).

Judge Knowles also referred to the fact that individuals were named as parties to certain early will contests and then inferred therefrom that the contest could not be “an action in rem, in which a contest is made against the validity of the will” (pp. 426-427). We find no authority for the proposition that the designation of the respective interested parties in the caption of a case as proponents or contestants, or similar terms of differentiation, can convert into a suit *in personam* a proceeding which by its essential character is one *in rem*.

But if there is such a rule we invite the Court to look at the captions of the cases cited in Appendix D. It appears that all will contest cases reaching the Supreme Court of Oregon prior to *Cline's Will* (June, 1893), 24 Or 175; 33 Pac 542, were entitled *in that court* by the names of the respective parties who propounded or contested the will. Examples are cited in Judge Knowles' opinion. The Oregon Supreme Court opinions in those cases do not show how the proceedings were entitled in the *county courts*. But beginning with *Cline's Will* and continuing down to date, all will contest cases decided by the Supreme Court of Oregon, with a few scattered exceptions, have been entitled in the probate proceeding, usually but not always,¹ with a sub-title identifying the proponents and the respondents respectively as appellants or respondents. For examples, see Appendix D. In Oregon practice, plenary suits *in personam* are between plaintiffs and defendants, and the name of an estate would have no place in the title of the cause (ORS 13.010, 15.020, 16.030, 16.210). So, if captions characterize the proceeding,

1. Examples of cases entitled only in the estate with no sub-title are: *John's Will* (1896), 30 Or 494, 47 Pac 341; *Booth's Will* (1901), 40 Or 154, 61 Pac 1135; *Skinner's Will* (1902), 40 Or 571, 62 Pac 523; *Holman's Will* (1902), 42 Or 345, 70 Pac 908; *Mendenhall's Will* (1903), 43 Or 542, 72 Pac 318.

it is now clear that from 1893 down to date, will contests could not be plenary suits *in personam*.

We recognize, of course, that on a question of federal law, the decisions of the Federal courts, whether right or wrong, are binding on the state courts. We realize also that in certain classes of cases wherein Federal jurisdiction depends upon the effect of a state statute, the Federal courts may determine for themselves the actual effect of the statute. But the questioned statements of Judge Knowles did not come within either rule. On the contrary, the basic question there considered, as the court itself recognized, was purely one of state law, as to which the Federal Court, as it also recognized, was bound by the statutes and decisions of Oregon. That question, as treated in the *Richardson* case, was actually one of fact, rather than of law; and a mistake in deciding such a question would not, in any event, bind anyone not a party to the decree.

But after all, there is really no occasion now to determine whether the opinion in the *Richardson* case was justified by the statutes then in effect, or by the cases theretofore decided by the Supreme Court of Oregon or by the Supreme Court of the United States. Since that time, there have been several important developments, any one of which would be sufficient to render the *Richardson* case inapplicable as a precedent here. The following are examples:

(a) In 1893, after the *Richardson* case had been tried and decided in the lower court (56 Fed. 384), the Oregon Legislature (prompted, no doubt, by that decision) passed the Act set out in full in Appendix C. Section 4 of that act, now ORS 115.180, specifically authorized will contests in the probate courts. *Mansfield v. Hill* (1910), 56 Or 400,

408; 107 Pac 471, 474; *Florey v. Meeker* (1952), 194 Or 257, 279-280; 240 P2d 1177, 1187.

(b) A long line of will contest cases decided by the Supreme Court of Oregon after the *Richardson* opinion was written, leave no room for doubt that such contests must originate in the probate court as a part of the probate proceeding. See cases cited in Appendix D, noting particularly those beginning with *John's Will* (1896), 30 Or 494; 47 Pac 341, and continuing to the end of the list.

(c) Since the decision in the *Richardson* case, there have been decided by the Supreme Court of the United States many of the more important cases on the issue now before this court. One example is *Sutton v. English* (1918), 246 US 199, which is important here not only because it became the leading case on federal jurisdiction in such matters, but also because it arose in Texas where the jurisdiction of the probate court is the same, in every respect now material, as that of the probate court in Oregon (246 US 205-206).

(d) In 1921 the Oregon Legislature enacted the Statute, referred to above as the 1921 Act (ante. p. 33) making it clear that will contests are to be tried in the probate court as a part of the probate proceeding.

8. *The 1893 Act—Appendix C*

Appellant contends that this act made no change in the law with respect to will contests except to prescribe a time limitation for instituting contests (Op. Br. 73-75). Bearing in mind the date of the act and the subjects covered, we surmise that it was intended to settle the very questions involved in the *Richardson* case.

Certainly, the act was not intended to be merely a statute of limitations. If that were its purpose, the act has been misunderstood by all of the eminent lawyers and jurists who compiled the six different Oregon Codes (B. & C. 1902; L.O.L. 1920; O.C.A. 1930; O.C.L.A. 1940; O.R.S. 1953) published since 1893; for each of them placed Section 4 among the code sections relating to *wills* rather than among those classified as statutes of *limitation*. In each compilation, all classes of limitations applicable to the various types of plenary suits and actions were codified together as such; and in none was Section 4 of the 1893 act so classified. The reason will appear upon analysis of the 1893 act.

The 1893 Act consisted of four sections. *Section 1* required every custodian of a will to deliver it to the executor, or to the county court, within a stated period. *Section 2* designated the parties who, whether in possession of the will or not, were authorized to petition the court "to have the will proved". *Section 3* provided for compulsory process to require production of a will "in the possession of a third party". *Section 4* then provided:

"Section 4. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, *contest the same or the validity of such will*; and in case a will has been heretofore admitted to probate, such contest may be made at any time within one year from the taking effect of this act; and all proceedings for *such contests or for probating wills* must be begun within the time herein specified; *provided*, that if a person entitled to contest the *probate of a will or the validity thereof* be laboring under any legal disability, the time in which he may institute *such contest* shall be extended one year from and after the removal of such disability."

There is nothing at all ambiguous in the 1893 act when read in its entirety. Section 4, presently involved, expressly—

- (1) declared that any person interested in a will may *contest* either (a) the *validity* of the will, or (b) the *probate* thereof; and
- (2) prescribed periods of limitation both (a) for *probating wills* in the first instance¹, and (b) for instituting *contests* after the initial probate.

Appellant treats Section 4 as if it consisted only of the second of these two parts—the limitations. If that were all the Legislature intended to accomplish, that was all that it needed to say. But Section 4 did more than that. It affirmatively declared the right of any interested person to contest the *will*, or the *probate*, in the county court. By necessary implication at least, it required the contest to be a part of the probate proceeding, for *no power was vested in the county court to proceed in any other manner*.

It will be noted that all four sections of the act had reference to just such situations as those involved in *Richardson v. Green*. Had the 1893 act been in effect at that time, Section 1 would have made it the defendant's duty to file the alleged will within a stated time; Section 2 would have authorized the plaintiffs to initiate an appropriate proceeding even though they did not have possession of the will; Section 3 would have provided compulsory process for production of the alleged will; and Section 4 would have cleared up the jurisdictional questions there involved by requiring the will contest to be instituted in the probate court as a part of the probate proceeding.

1. The one year limitation for probating wills in the first instance was continued down through the various subsequent codes (B. & C. 1108; L.O.L. 1143; O.L. 1143; O.C.A. 11-207 and O.C.L.A. 19-208) until removed by Ch. 185, Or. Laws, 1945.

The wording of Section 4 should be carefully noted. The "contest" referred to includes both (1) a contest of the *will*, and (2) a contest of its *probate*. The first would involve such issues as due execution of the will, testamentary capacity, undue influence, etc.; while the second would involve the regularity of the *proceedings* by which the will was admitted to probate. The latter, obviously, would have to be a part of the probate proceeding. As only one form of contest is provided for, the legislative intent to make the entire contest a part of the probate proceeding is clear.

9. *Proof of the Alleged "New Will or Codicil" Could Be Made Only in the Probate Court*

In his third claim appellant alleged vaguely that Mrs. Jackson had executed a "new will or codicil" (R. 69) which "amended or revoked" (Op. Br. 16) the will admitted to probate. Even if that were true, those facts would not entitle appellant to institute a plenary suit in an Oregon court to obtain the relief sought.

The leading cases relied upon by appellant on this point were decided at a time when probate courts in the particular jurisdictions involved had no adequate power, as an incident of their ordinary probate jurisdiction, to require production of concealed or suppressed wills. In Oregon, that power was supplied, if it did not exist before, by Section 2 (now ORS 115.130) of the 1893 Act, set out in Appendix C. This Act gave the probate court all of the powers of discovery and compulsory process needed to meet such a situation as plaintiff undertakes to describe.

The 1893 Act also provided for the probate of lost or destroyed wills (Section 3, now ORS 115.120). A single volume of the Pacific Reporter contains two Oregon cases

involving the probate of lost or destroyed wills. In one, *Miller's Will* (1907) , 49 Or 452; 90 Pac 1002, the lost will was admitted to probate. In the other, *McCoy's Will* (1907) , 49 Or 579; 90 Pac 1105, probate was denied, but only because of a failure of proof.

Moreover, proof of the existence of a will executed after the one tendered for probate in this case would be ample ground for contesting the will in question. That is shown in many of the will contest cases cited in Appendix D. Obviously, no purported will which has been revoked or superseded by a later one can be established as the "*last will and testament*" of the decedent. So, in Oregon a probate court, as a part of the probate proceeding, has full power to ascertain and determine whether there is outstanding any will entitled to probate. It may be safely said that while a probate proceeding is pending in a probate court, no Oregon court of general jurisdiction would undertake to determine whether a will tendered for probate was in fact the *last will* of the decedent, no matter how the issue might be presented.

The adequacy of a remedy in the probate court for relief from fraud in the probate of a will has been referred to many times by the courts in determining equitable jurisdiction to set aside the probate decree. One example is *Broderick's Will*, cited above (p. 8) , wherein the court said:

"And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." (88 US 510)

“It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the Probate Court during the proceedings instituted for proving the will, or at any time within a year after probate was granted; and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the Probate Court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The Probate Court was fully competent to afford adequate relief.” (p. 517)

Simmons v. Saul (1890), 138 US 439, was a suit in equity brought in the Federal court in Pennsylvania to charge the defendants as trustees because of fraud in the probate of an estate in Louisiana. The prayer was that the probate proceeding be held to be void, that an account be taken for timber sold from certain lands and for other relief. The Supreme Court, after finding that the probate court could have granted full relief on timely application, concluded:

“The case of *Broderick's Will*, 21 Wall. 503, upon this point is absolutely conclusive against the appellants. That was a bill in equity brought by the alleged heirs-at-law of Broderick to set aside and annul the probate of his will in the probate court of California, and to recover the property belonging to his estate, or to have the purchasers at the executor's sale thereof, and those deriving title from them, charged as trustees for the benefit of complainants. The bill alleged that the will was forged; that the grant of letters testamentary and the orders for the sale of the property were

obtained by fraud, all of which proceedings, as well as the death of decedent, were unknown to the complainants until within three years before the filing of the bill. A demurrer to the bill was overruled and the case was appealed to this court. It was held, Mr. Justice Bradley delivering the opinion, that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court; and that it will not give relief by charging the purchasers at the executor's sale, under the orders of the probate court, and those deriving title from them, as trustees, in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief, in whole or in part.

“With the single exception that that case was brought to set aside the probate of a will, and this was brought to set aside the granting of letters of administration upon a succession, the two cases are as much alike as two photographs of the same person, the lineaments of the alleged fraud being more distinctly brought out in the bill in the case of *Broderick's Will*, than in the bill in this case. Both were bills in equity, brought by the alleged heirs-at-law of a decedent, to set aside and annul a decree of a court of probate, and all the subsequent proceedings, including the order of sale and the sale itself. Both alleged fraud in the procurement of the respective decrees, and knowledge of the fraud by the defendants—actual knowledge in the *Broderick Case*, and constructive knowledge in this case. Both showed a long period of delay—nine years in the *Broderick Case*, and eighteen in this case, and both set up ignorance of the facts as the excuse for laches; and in both cases, according to the averments of the bill in each, the probate court had adequate power to afford relief. See also *Ellis v. Davis*, 109 U.S. 485. We think the decision in that

case is applicable to the whole of this case upon the question of fraud, and thus obviates the necessity of adverting any further to the question of the establishment of a trust, as against the defendant, in favor of the complainants." (pp. 459-460)

It seems clear, first, that all of the relief which appellant seeks on account of the alleged missing will can be obtained in the probate court, and second, that in such a situation the Federal courts cannot intervene.

10. *Effect of Acts Transferring Probate Jurisdiction to the Circuit Courts*

Beginning in 1919, the Oregon Legislature inaugurated a series of Acts, each applicable to judicial districts of a particular class (based on population, etc.), which resulted in the transfer (a) of all probate powers to the circuit courts in certain judicial districts, and (b) particular probate powers to the circuit courts in certain other judicial districts. See Appendix B.

The important feature of each of these transfers of jurisdiction is that the probate powers thereby vested in the circuit courts were kept separate and distinct from the general jurisdiction of the circuit courts. As observed by the Supreme Court of Oregon in a case transferred under §13-502, O.C.L.A. (now ORS 5.050, App. B) :

"* * * Whenever a probate matter is transferred from a county court to a circuit court under §13-502, O.C.L.A., the circuit court merely acquires a new duty, or, to put it otherwise, the proceeding acquires a new judge whose powers and jurisdiction in the transferred proceedings are identical with and no greater than those which could have been exercised in the premises by the county court whence the matter came, if the

subject of the contest was within the jurisdiction of the county court and had been tried therein. Such transfer results only in a change of forum without enhancement of judicial power.” (*Estate of Ott*, 193 Or 262, 273; 238 P2d 269, 273)

In that case the court quoted its earlier observation in *Van Vlack v. Van Vlack* (1947), 181 Or 646, 666; 182 P2d 969, 977, that “a probate court, whether sitting in its ancient home or in the courtroom of our circuit court, is one of limited jurisdiction.” (193 Or 272; 238 P2d 273). And the same quotation was again repeated with approval in a case appealed from the Circuit Court for Multnomah County, Probate Department, to which probate jurisdiction was transferred by ORS 3.340. *Arnold v. Arnold*, 193 Or 490, 500; 237 P2d 963, 968. The case last cited contains a comprehensive review of the prior cases on the same subject and makes it unnecessary for us to cite them here.

Appellant’s argument that ORS 3.340 supports his contention that the Circuit Court for Multnomah County has general equity powers while sitting as a court of probate (Op. Br. 71-72) is answered by the following quoted from the opinion in the *Arnold* case:

“* * * The County Court, sitting in probate, had the exclusive jurisdiction, in the first instance, pertaining to a court of probate (Sec. 13-501, O.C.L.A.), and was a court of general jurisdiction in exercising probate powers. *In re Stroman’s Estate*, supra, 178 Or. 109. See cases cited in notes to Sec. 13-501, O.C.L.A., Vol. 2, p. 440. The mode of proceeding was in the nature of a suit in equity as distinguished from an action at law (Sec. 19-101, O.C.L.A.), although the county courts were not ‘vested with general equity powers.’ *In re Elder’s Estate*, 160 Or. 111, 115, 83 P. 2d 477, 119 A.L.R. 302. Nor does this statute vest the

Circuit Court with general equity powers, but only with such powers in matters 'pertaining to a court of probate', and these, as we have seen, do not include controversies of the kind with which we are here dealing." (193 Or 501-502; 237 P2d 968-969)

PART II—THE SUBSIDIARY CLAIMS

As explained above (p. 5), these subsidiary claims consist of what appellant pleaded as two separate claims — the *First* and the *Second*.

The *First* claim alleged that the trust set up by Article VI is invalid "because the purposes of the proposed charitable trust are so indefinite and uncertain that the same cannot be executed and carried out, and because the discretion accorded the trustees therein is so wide and indefinite that their consciences cannot be held to the carrying out of a definite and certain purpose under the supervision of a court of equity." (R. 58; Op. Br. 15)

The *Second* claim alleged that the charitable trust actually has for its purpose only the result of avoiding taxes and of creating a perpetuity whereby a group of persons may use the trust property for their personal profit with charity as a secondary and subordinate incident. (R. 60; Op. Br. 15-16)

These claims, it will be noted, are based entirely on grounds appearing on the face of the will. They are directed solely at Article VI, and they present only questions of law.

Judge Mathis in his Memorandum of Decision indicated that his court, though without jurisdiction of the will contest, would have jurisdiction of these subsidiary claims if no

will contest were involved. Appellant, on filing his amended complaint, did not eliminate the will contest; instead, he reasserted it as set out in his original complaint. And on this appeal, appellant is continuing his contention that Article VI is not the will of the decedent, and that the court below had the right to so determine. In short, appellant at all times has been and still is unwilling to eliminate his "no will" claim from the case.

We shall assume that the court below would have had jurisdiction to decide the subsidiary claims if the writing on which they are based were not being challenged by appellant on the ground that it was not the will of Mrs. Jackson but of others. That, of course, is not the situation presented here. Appellant is asking the court, sitting in equity, to determine as a matter of law the legal effect of what he claims to be merely a combination of words having no legal significance in any event. There are a number of reasons why, we contend, there is no basis for such a request.

1. *While a contest of a will is in prospect, the courts will not entertain a proceeding to determine the construction, validity or effect of particular provisions in the will.*

It is axiomatic that courts will not decide hypothetical or moot questions; and the rule applies as well to questions which may become moot as to those already known to be so.

Accordingly, the courts have been careful to segregate the probate of a will, on the one hand, from questions as to its construction or validity on the other. And they have been just as careful to avoid determination of questions of interpretation or validity until after the will has been finally proved and established as the decedent's will. The

general trend of the decisions is indicated by the following excerpts from the authorities:

“In determining whether an instrument proffered for probate is or is not a will, the court cannot ordinarily enter into any consideration of the construction of the will, resolve inconsistencies in the disposition of the property, or construe the provisions of the instrument. These are matters which may properly arise only after the probate of the will.” (1 Bancroft’s Probate Practice, 2nd Ed., Sec. 132, p. 324)

“Equity will not construe a will which has not been admitted to probate, or while proceedings for a rehearing of probate are pending.” (4 Page on Wills, Lifetime Ed. Sec. 1603, p. 574)

“Equity will not entertain a suit to construe a will in order to answer merely moot, experimental or abstract questions.” (Idem. p. 575)

“Probate logically precedes construction, for otherwise there is no will to construe.” (*Davis’ Will* (CCA NY), 75 NE 530, 533)

In discussing the power of equity courts to construe wills, Pomeroy, *Equity Jurisprudence* (5th Ed.), Vol. 4, Sec. 1157A, 466, states:

“It is well settled that a court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain; * * *”

Borchard, *Declaratory Judgment* (Sec. Ed.), pp. 702-703, states:

“In view of the predominant rule that declaratory judgments constitute alternative remedies and are regulated by the ordinary rules of procedure, it is not

surprising to find that the tests which have been set up as a criteria for a cause of action in a proceeding for a declaratory judgment construing a will, do no violence to the conventional concept of a cause of action. Thus, courts have carefully scrutinized will cases to determine whether or not they have jurisdiction of the cause of action before entertaining the suit. They have refused to consider cases in which there was no 'controversy', in which the facts were not ripe for determination, or in which the declaration proposed was looked upon as futile. They have carefully avoided suits designed to receive general advise, and have on occasions been reluctant to accept suits requiring the determination of complicated facts. They have refused to consider suits relating to rights which could vest only in the future and for whose determination there is no immediate need." (pp. 702-703)

One illustrative case is *Ball v. Cooter* (Tenn; 1947), 207 SW2d 340. The executrix under a will filed suit against the defendants, as legatees and devisees under the will, to obtain an interpretation or construction of the will. In the argument on appeal it developed that a will contest was pending. The court said:

"Since the interests of the executrix is wholly dependent upon the establishment of the will she has at present no interest that justifies her in filing the bill, nor is there 'a present controversy' which the court can finally settle by making the declaration sought. * * * The construction of the document is at present 'not justiciable' * * *. A judgment in the circuit court adverse to the will, would render any decree of this Chancery cause purely theoretical. The court will make no declaration in such circumstances. * * * The declaration must be a final determination of rights and will not be given in aid of another proceeding * * *".

“For these reasons courts in other states have expressly held that a declaration will not be made to construe a will ‘when another suit is pending on the same problem’ * * *”. (pp. 341-342)

On rehearing the court said:

“However, according to the petition for rehearing, counsel for both sides agreed that the lawsuit should be held in abeyance until our decision of this Chancery case. By their agreement, we think for the reasons fully set forth in our original opinion, counsel agreed to put the cart before the horse, and that the agreement should have been to hold the Chancery suit in abeyance until the final determination of the suit at law. If that final determination of the lawsuit is to the effect that the will is invalid, no construction of the instrument will be necessary, and if the will be held valid and there remain matters requiring a declaration by the Chancellor, doubtless, then the pleadings in the present suit may be amended to meet the situation.” (207 SW2d 343)

So far as we can determine, there is no conflict of authority on this proposition. Not one of the cases cited by appellant holds to the contrary. In some of them the court was careful to point out that no will contest was involved. Without reviewing them all, we point to the following as examples.

One is *Spencer v. Watkins* (CCA 8th: 1909) , 169 F 378, heavily relied upon by appellant (Op. Br. 32, 36, 37, 52, 57, 62, 63). The facts have been stated above (p. 19). The court said:

“The suit of the heirs was *not a will contest* in the customary acceptation of that phrase. *No question was involved that would properly arise at the presentation of a will for admission to probate. The heirs did not*

seek to annul the probate of the will in question. They did not challenge the testamentary capacity of the testatrix or the sufficiency as to authentication or form of the written expression of her testamentary purposes. On the contrary, it was averred in their bill of complaint and admitted in the answer that the instruments in question had been duly admitted to probate as the last will and testament of the deceased, and that letters testamentary had been duly issued to the defendant executors." (p. 382)

Another example is *Waterman v. Canal-Louisiana Bank Co.* (1909), 215 US 33, also strongly relied upon by appellant (Op. Br. 25, 42, 46, 53, 57, 62, 63, 72). The issues presented were much like those involved in *Spencer v. Watkins*, *supra*. The *Waterman* case was a suit by heirs to obtain a determination that certain legacies had lapsed because of the non-existence or inadequate identification of the legatees. In holding that the case was within Federal jurisdiction, the Supreme Court pointed out:

"The complaint, it is to be noted, *does not seek to set aside the probate of the will* which the bill alleges was duly established and admitted to probate in the proper court of the State." (215 US 46).

Gebhard v. Lenox Library (1907), 74 NH 416, 68 Atl 540, cited and quoted by appellant (Op. Br. 54-55), clearly supports our position; and we submit that this appears from appellant's quotation from the opinion (Op. Br. 55).

The basic error in appellant's reasoning on this point, as we view it, is his assumption that (1) contesting the will, and (2) challenging the validity of its provisions, are not only alternative, but also *concurrent*, remedies. But that is not true. The two remedies cannot be pursued concur-

rently, but only successively, and then only in the order of succession indicated above.

The probate of the Jackson will in common form will not become final until (1) it is reprobated in solemn form, or (2) the time allowed for contest expires, or (3) the party or parties entitled to contest it renounce that right. None of these events has happened. That appellant intends to contest the will if Article VI is found to be valid on its face, is obvious from the allegations in his complaint. He has at all times carefully reserved that right, and his intent to exercise it in *some court* is clear from his own pleadings.

Even in the title to the amended complaint, appellant referred to the defendant Davies and the Bank as "Executors under the *purported* will and testament of Maria C. Jackson, deceased", and to the defendants Davies, Knight and the Bank as "*purported* Trustees appointed by said *purported* last will and testament". He treats Article VI, not as the will of Mrs. Jackson, but merely as her "*purported*" will.

This case therefore is clearly distinguishable from those wherein a court of general jurisdiction undertakes to construe a will which has been proved and established as such. In all such cases, the final decree of the court will put an end to the controversy for all time. Here, the decree of the court, if for the appellees, will not settle the controversy; it will merely result in another proceeding in another court to obtain a determination that the Federal courts in this case had wasted their time because the instrument on which their adjudication was based never had any legal existence anyway. Plaintiff has cited no authority to justify this or any other court in undertaking to make such a contingent, hypothetical and inconclusive determination.

2. *A Federal court in a diversity case will not undertake to decide claims within its jurisdiction when mingled with related claims outside its jurisdiction if they all are within the jurisdiction of the state court.*

In both *Broderick's Will*, *supra*, and *Simmons v. Saul*, *supra*, the complainant sought not only to set aside a will but also other relief which was within the jurisdiction of the Federal courts under the diversity statute. In each case, the Supreme Court sustained or directed dismissal of the entire suit. The reasons are indicated in the above quoted parts of the opinions. (pp. 8-9; 46-48)

Haines v. Carpenter (1875), 91 US (1 Otto) 254, was a suit brought in the Federal court seeking the determination of a variety of questions arising under a will (including a claim that the will was "null and void") for the purpose of avoiding a multiplicity of suits. The lower court sustained a demurrer to the bill and dismissed the suit. The Supreme Court affirmed, saying:

"A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, *they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States*, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer." (pp. 256-257)

Ellis v. Davis (1883), 109 US 485, cited above (p. 9) was a suit brought by next of kin in the Federal Court to set aside a will, to recover possession of certain lands, to obtain an accounting of rents and profits, and to cancel a deed made by the decedent during her lifetime. The Supreme

Court, after holding that there was no jurisdiction over the will contest, referred to the other requested relief and said:

“There is nothing left, therefore, as a ground of support for the present bill, except so much of the case made by it as rests upon the prayer for the cancellation of the sale and conveyance of the Beauvoir estate by Mrs. Dorsey in her lifetime. That relief is claimed in part on the ground of a constructive fraud, growing out of the defendant’s relation to her at the time as a confidential agent; but we see nothing in the circumstances as detailed to forbid such a transaction between the parties, and the charges of actual fraud and undue influence applicable to this sale, considered as detached from the rest of the case, are not of such character, even when admitted by the demurrer, as in law would justify a rescission. *And as the case for relief as to this sale is not made independently, but only as part of the whole case intended to be presented by the bill, we conclude that it must fail with the rest.*” (pp. 503-504)

In *Sutton v. English* (1918), 246 US 109, cited above (p. 11), the complaint prayed not only that a will be set aside but also for other relief, some of which was within the jurisdiction of the Federal court. In dismissing the suit, the Supreme Court held that the Federal court had no jurisdiction to set aside the will, and that while it had jurisdiction to grant the other relief sought, it should not do so for reasons stated as follows:

“It will be seen that the contention must be overruled at once, so far as concerns the equitable jurisdiction of the county court, because in the case before us the title to land is involved and the matter in controversy exceeds \$1,000. The jurisdiction of the district court is not thus limited, and, under local decisions (*Japhet v. Pullen*, 63 Tex. Civ. App. 157, and cases cited) it may be assumed that an independent suit in

equity could be entertained by that court, and therefore—under the decisions of this court to which reference has been made—might be brought in the United States District Court, for the purpose of construing the joint will of Moses and Mary Jane Hubbard as inefficacious to dispose of the community property, and to set aside, for fraud or on other grounds, the judgment recovered by the defendants English and others against Mary Jane Hubbard establishing their title to that property; and that, if the title of complainants as heirs-at-law of Mary Jane Hubbard could thus be shown, the jurisdiction to partition the property would follow as of course. But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit.” (pp. 206-207)

There are several special reasons, plainly indicated in appellant's complaint, for applying here the rule stated in proposition 2 above. The complaint shows that the subsidiary claims were brought into the case as mere incidents of the will contest. They are pleaded as part of the alleged over-all fraudulent scheme. These claims, when read in connection with cross references to other allegations, were framed so that they could be used as further evidence of the undue influence which, appellant claims, induced the testatrix to include Article VI in her will.

Appellant was not content to say, as he needed only to say, that the trust provisions were fatally indefinite and that they violated public policy in the respects claimed; but he

went further and alleged that those provisions were fraudulently designed by Mrs. Jackson's advisers to gain advantages for themselves. All these charges can be made, and doubtless will be, on the will contest. The court below was not required to separate these subsidiary claims from the rest of the will contest and decide them in advance of the contest. Appellant has cited no case in which such a course has been approved by any Federal court.

3. *It was within the lower court's discretion to decline, under the rules of comity, to decide the subsidiary claims in advance of a determination of the will contest.*

Appellant seems to admit that a probate proceeding is one *in rem*, that it takes control of the *res*, and that the probate court has exclusive possession and administration of the property of the estate (Op. Br. 61).

On the other hand, appellees recognize that courts of general jurisdiction, including Federal courts in diversity cases, normally have jurisdiction to hear and decide such questions as those involved in the subsidiary claims when such determinations do not interfere with the administration of the estate in the probate court. Appellants agree also that the decision of the Federal court in such a case is binding upon the state probate court.¹

But the mere fact that Federal courts may, in some cases arising out of the administration of estates, have concurrent jurisdiction with the state courts, does not mean that they

1. Appellant charges Judge Mathis with making the "amazing" suggestion that the Oregon court might refuse to recognize the decision of the Federal court in such a situation (Op. Br. 31-32; 44). We think appellant has misread Judge Mathis' Memorandum. All that he said, as we read the Memorandum, was that *while this action is still pending in the Federal court*, the Oregon state court might refuse to consider the will contest or related questions. Certainly, the Oregon court would have that right.

will in all cases exercise that jurisdiction. Certain rules of comity have developed under which a Federal court may stay its hand, even in cases where it would have jurisdiction to act.

The principle of comity has been described by the Supreme Court in a habeas corpus case as:

“a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” (*Darr v. Burford*, 339 US 200, 204, 94 L Ed 761, 70 S Ct 587.)

In *Kelleam v. Maryland Cas. Co.*, 312 US 377, 85 L Ed 899, 61 S Ct 595, an administrator's surety brought suit in the Federal court for exoneration (while a separate action was pending to set aside an order of distribution on grounds of fraud) and obtained the appointment of a receiver to conserve the decedent's property pending the outcome of the dispute between the heirs. The Supreme Court held that the receiver should not have been appointed, since it was not auxiliary to other relief, and made the following observations pertinent to our present inquiry:

“And even if the bill be contrued as drawing in issue the merits of the controversy between the heirs which the federal court had jurisdiction to adjudicate within the rule of *Arrowsmith v. Gleason*, 129 U.S. 86, and *Sutton v. English*, 246 U.S. 199, 205, that court could not with propriety proceed. A case involving that very controversy was pending in the Oklahoma court. That case did not involve simply an *in personam* action. Cf. *Kline v. Burke Construction Co.*, 260 U.S. 226. It involved an adjudication of rights to specific property distributed pursuant to a probate decree. Cf. *Penn General Casualty Co. v. Pennsylvania*, *supra* at p. 195.

The federal court therefore should not have asserted its authority. In such a case it is 'in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' *Pennsylvania v. Williams, supra*, p. 185." (312 US at p. 382)

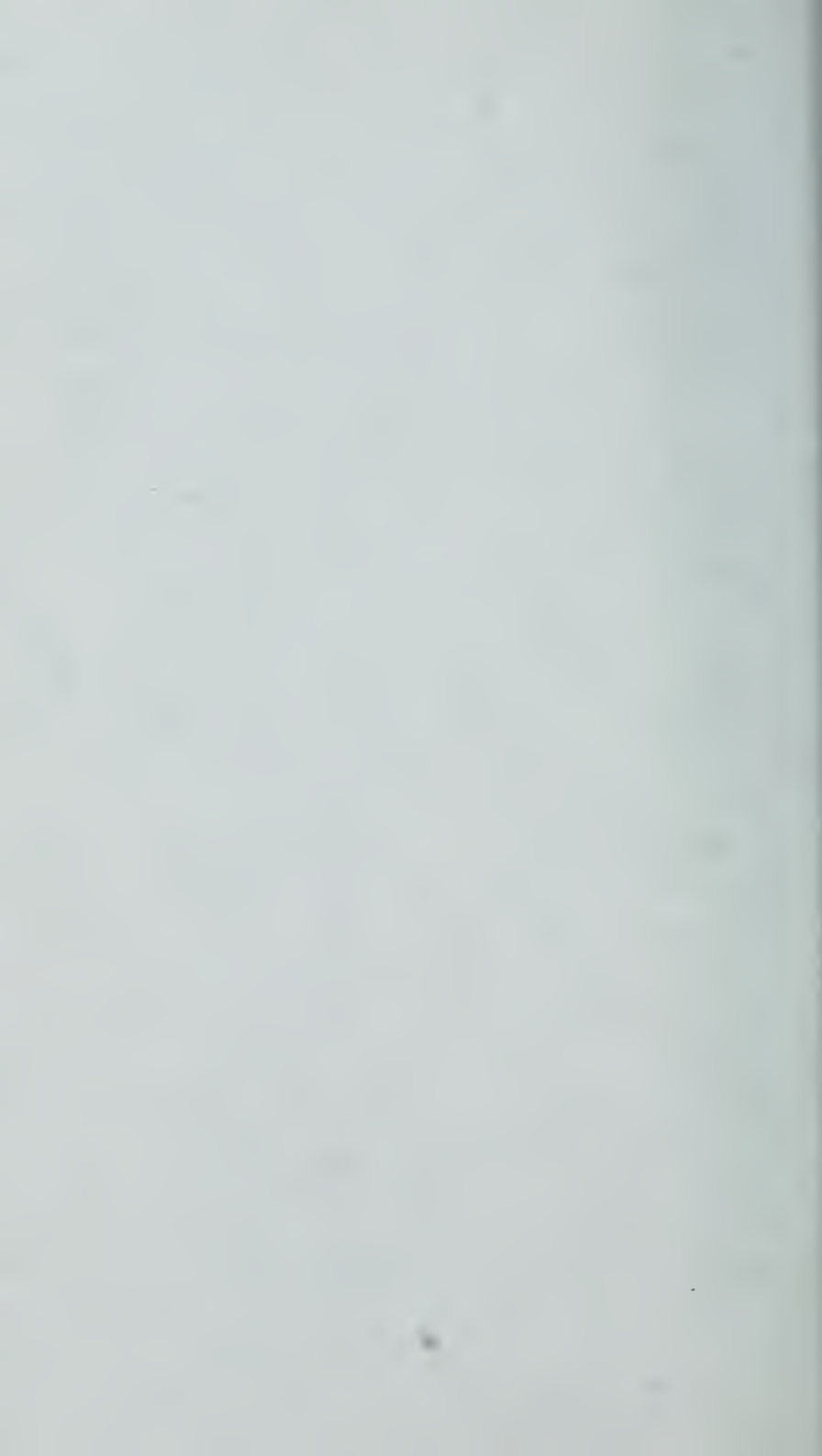
The principles thus stated are familiar ones, and supported by authorities too numerous to cite in this brief. We think they are peculiarly applicable here. The subject matter of this action (i.e., the will) is already within the jurisdiction of the state probate court. That court will be required to determine whether Article VI is, or is not, the will of Mrs. Jackson. The issues of fraud and undue influence will be decided in the normal way by the only court authorized to decide them. The decision of such issues may determine, to a considerable extent, the course of administration of the estate thereafter. There is no good reason why the Federal court should *at this time* intervene and take over a part of the basic controversy. Since appellant is a minor he is not barred by the six-months' provision in the statute providing for will contests. Accordingly it was proper for the lower court, in the exercise of a decent respect for the functions of a co-ordinate tribunal, to withhold action, even if the subject matter were within the jurisdiction of the Federal court.

Respectfully submitted,

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Appendix



APPENDIX A

Oregon Constitutional Provisions

The Judicial Department of the State of Oregon is set up in Article VII of the State Constitution. That Article, as originally adopted by the people of Oregon in 1857 contained the following provisions:

"Sec. 1. The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law in accordance with this constitution. * * *"

"Sec. 6. The supreme court shall have jurisdiction only to revise the final decisions of the circuit courts; * * *"

"Sec. 9. All judicial power, authority and jurisdiction not vested by this constitution, or by laws consistent therewith exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers and tribunals."

"Sec. 12. The county courts shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary as may be prescribed by law. * * *"
(General Laws of Oregon, 1845-1864, M. P. Deady, pp. 112-114; ORS, Vol. 5, pp. 1018-1020)

Article VII of the Constitution of Oregon was amended by vote of the people in November, 1910. The amended Article contained the following provisions:

"Section 1. The judicial power of the State shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. * * *"

“Section 2. The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the Supreme Court may, in its own discretion, take original jurisdiction in mandamus, *quo warranto* and habeas corpus proceedings.” (General Laws of Oregon, 1911, p. 7; ORS Vol. 5, pp. 1016-1020)

The above quoted provisions of sections 9 and 12 of the original Constitution were not “expressly changed” by the 1910 amendment but have remained in effect except as otherwise indicated in this brief.

APPENDIX B

Oregon Statutes

I. PROBATE JURISDICTION OF OREGON COURTS

(a) *ORS 5.040—County Courts generally.*

County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, to

(1) Take proof of wills.

(2) Grant and revoke letters testamentary of administration and of guardianship.

(3) Direct and control the conduct, and settle the accounts of executors, administrators and guardians.

(4) Direct the payment of debts and legacies, and the distribution of the states of intestates.

(5) Order the sale and disposal of the property of deceased persons. * * *

(b) *ORS 3.340—Circuit Court for Multnomah County (Portland).*

There also is conferred upon, and vested in, the circuit court of a judicial district described in ORS 3.310 full, complete, general and exclusive jurisdiction, authority and power in equity, in the first instance, in all matters what-

soever pertaining to a court of probate, including the construing of, and declaration of rights under, wills and codicils, and therein the determining of question of title to real, personal or mixed properties; and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present such claims to the circuit court, or a judge thereof, for allowance, as provided by ORS 116.525 and 116.530, or he may, and if such executor or administrator demand it in writing, he shall, in the first instance bring a separate plenary action or suit against such executor or administrator on the claim. (Codification of section 11, Chapter 530, Oregon Laws, 1949)

Note: This was the statute construed by the Supreme Court of Oregon in *Arnold v. Arnold*, 193 Or 490; 237 P. (2d) 963. See Appendix C to this brief.

(c) *ORS 3.130—Particular circuit courts other than the circuit court for Multnomah County.*

(1) All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit courts and judges thereof: (here follows a list of four different classifications of judicial districts based upon population and number of counties in the district.)

(2) All matters, causes and proceedings, except those relating to county business, pending in a county court at the time a county or district comes within the scope of this section, shall be transferred to the circuit court for that county. (Codification of Section 4, Chapter 677, Oregon Laws, 1955)

ORS 3.140—Same subject as ORS 3.130.

(1) The circuit courts and the judges thereof in each of these districts or counties described in ORS 3.130, shall

be governed by the existing laws relating to the exercise of the transferred judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, in so far as they may be applicable, as though the circuit courts and the judges thereof had originally been referred to in the existing laws; except that the circuit courts and the judges thereof shall have in the first instance exclusive jurisdiction in equity in all matters pertaining to probate, including the construction and declaration of rights under wills and the determination of questions of title to real, personal or mixed property thereunder, and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present the claim to the circuit court for allowance as provided in ORS 116.525 and 116.530, or he may, and the executor or administrator demands it in writing, he shall, in the first instance bring a separate plenary action or suit against the executor or administrator on the claim.

(d) *ORS 5.050—Jurisdiction of Circuit Courts, other than those referred to in (b) and (c) above, over particular contested matters transferred from the County Courts.*

Any contested probate matter in the county court, other than upon a creditor's claim for less than \$500, shall, on motion made and filed by any party in interest, or on motion of the county court, at any time prior to the commencement of the trial of an issue of fact, forthwith be transferred by the county court, by order entered in its probate journal, to the circuit court for the county in which is pending the probate proceeding out of which such contest arose, and it shall therein proceed to be tried and determined in the same manner and with like effect, except as in this section otherwise provided, as though it were in the county court. To that end, the circuit court shall have

exclusively, as to such contested probate matters, all the jurisdiction and powers pertaining to a court of probate possessed in the first instance by the county court. Upon the final determination of such contested probate matter, the county court shall resume jurisdiction thereof, and pending such determination, the county court shall proceed with all uncontested matters in the probate proceeding. * * * An appeal shall lie to the Supreme Court from the decree or other appealable determinative order of the circuit court in such contested matter, the same as from a decree or other determinative order of the circuit court in a suit in equity.

II. PROBATE PROCEDURE GENERALLY

ORS 115.010—Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity as distinguished from an action at law, except as otherwise provided by statute. The proceedings must be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by the person or at least one of the persons making the same. The court exercises its powers by means of:

- (1) A citation to a party.
- (2) A verified petition of a party in interest.
- (3) A subpoena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees.

ORS 115.020—Contents of petition to prove will or to appoint executor or administrator. A petition to prove a will or for the appointment of an executor or administrator shall set forth the facts necessary to give the court jurisdic-

tion and also state whether the deceased left a will or not and the names, age and residence, so far as known, of his heirs.

ORS 115.120—Persons entitled to petition for proof of a will. Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same is in his possession or not, or is *lost or destroyed* or beyond the jurisdiction of the state or is a nuncupative will. (Emphasis ours)

ORS 115.130—Order for production of will. If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order.

ORS 115.170—Testimony of attesting witnesses; affidavits; depositions. (1) Upon the hearing of a petition for the probate of a will *ex parte* and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. If an attesting witness is outside the reach of a subpoena of the court having jurisdiction of the probate of the will such witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

(2) However, upon motion of any person interested in the estate within 30 days after the order admitting the will

to probate is made, or upon the discretion of the court within that time, the court may require that the witness making the affidavit be produced before the court for further examination, or if the witness is outside the reach of a subpoena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

(3) However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

ORS 115.180—Contest of will. (1) When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest the same or the validity of such will; but, if a person entitled to contest the probate of a will or the validity thereof is laboring under any legal disability, the time in which he may institute such contest shall be extended six months from and after the removal of such disability.

(2) Any will made pursuant to ORS 114.060 may be contested and annulled within the same time and in the same manner as wills executed and proven in this state. (*Note: ORS 114.060 relates to wills of non-residents with respect to property in Oregon.*)

ORS 115.340—Proceedings when will found after administration granted. If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

III. PROOF OF WILLS

ORS 114.010—Term “will” includes codicil. The term “will”, as used in this chapter includes all codicils.

ORS 114.020—Who may make wills; limitations. Every person of 21 years of age and upward, or who has attained the age of majority as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy. (Amended by 1955 c. 69 Sec. 1)

ORS 114.110—Express revocation or alteration. A written will cannot be revoked or altered otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration and executed with the same formalities required by law for the will itself; or unless the will is burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person, in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

ORS 116.505—Publication of notice by executor or administrator. Every executor or administrator shall, immediately after his appointment, publish a notice thereof, in some newspaper published in the county, if there is one, or otherwise in such paper as may be designated by the court or judge thereof, as often as once a week, for four successive weeks, and oftener if the court or judge shall so direct. Such notice shall require all persons having claims against the estate to present them, with the proper vouchers within six months from the date of such notice, to the executor or the administrator, at a place within the county therein specified. Before the expiration of such six months

a copy of the notice as published with the proper proof of publication shall be filed with the clerk.

IV. RES ADJUDICATA

ORS 43.130—Judicial orders that are conclusive. The effect of a judgment, decree or final order in an action, suit or proceeding before a court or judge of this state or of the United States, having jurisdiction is as follows:

(1) In case of a judgment, decree or order against a specific thing or in respect to the probate of a will or the administration of the estate of a deceased person or in respect to the personal, political, or legal condition or relation of a particular person, the judgment, decree or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

(2) In other cases, the judgment, decree or order is, in respect to the matter directly determined, conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.

APPENDIX C

Act of 1893 relating to the production and contest of wills.

(Laws of Oregon, 1893, pp. 31-32)

AN ACT

[H.B. 36]

To Require Custodians of Wills to Deliver the Same for Record and to Provide the Time Within Which the Probate of Wills may be Contested.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the county court having jurisdiction of the estate, or to the executor named therein, and any

such custodian who shall fail or neglect to comply with the provisions of this section, shall be held responsible for any damages sustained by any person injured thereby.

Section 2. Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the estate, or is a nuncupative will.

Section 3. If it is alleged in any petition that any will is in possession of a third person, and the court is satisfied that the allegation is correct, and [an] order must be issued and served upon the person having possession of said will, requiring him to produce it at a time and place named in the order. If said third person has possession of the will, and refuses or neglects to produce it in obedience to the said order, he may be punished for contempt as in other cases of disobedience of the order of the court.

Section 4. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of such will; and in case a will has been heretofore admitted to probate, such contest may be made at any time within one year from the taking effect of this act; and

APPENDIX D

List of All Oregon Cases Involving Will Contests

(Note: In all cases marked by an asterisk, the ground, or one of the grounds, of contest was fraud or undue influence.)

Greenwood v. Cline (1879), 7 Or 17—Marion*

Hubbard v. Hubbard (1879), 7 Or 43—Marion*

Clark v. Ellis (1881), 9 Or 128—Union*

- Chrisman v. Chrisman* (1888), 16 Or 127, 18 Pac 6—Lane*
- Luper v. Wertz* (1890), 19 Or 122, 23 Pac 850—Linn*
- Potter v. Jones* (1891), 20 Or 239, 25 Pac 769—Clackamas*
- Franke v. Shipley* (1892), 22 Or 104, 29 Pac 268—Clackamas
- Rothreek v. Rothreek* (1892), 22 Or 551, 30 Pac 453—Umatilla
- Cline's Will* (June 1893), 24 Or 175, 33 Pac 542—Multnomah*
- John's Will* (1896), 30 Or 494, 47 Pac 341—Multnomah
- Darst's Will* (1898), 34 Or 58, 54 Pac 947—Marion*
- Booth's Will* (1901), 40 Or 154, 61 Pac 1135—Marion
- Ames' Will* (1902), 40 Or 495, 67 Pac 925—Linn*
- Skinner's Will* (1902), 40 Or 571, 62 Pac 523—Polk
- Holman's Will* (1902), 42 Or 345, 70 Pac 908—Multnomah*
- Mendenhall's Will* (1903), 43 Or 542, 72 Pac 318—Multnomah
- Buren's Will* (1906), 47 Or 307, 83 Pac 530—Marion
- Miller's Will* (1907), 49 Or 452, 90 Pac 1002—Union
- Pickett's Will* (1907), 49 Or 127, 89 Pac 377—Lane*
- McCoy's Will* (1907), 49 Or 579, 90 Pac 1105—Douglas
- Turner's Will* (1908), 51 Or 1, 93 Pac 461—Umatilla*
- Young's Estate* (1911), 59 Or 348, 116 Pac 95—Umatilla
- Stevens v. Myers* (1912), 62 Or 372, 121 Pac 434—Multnomah
- Hart's Will* (1913), 65 Or 263, 132 Pac 526—Malheur*
- Burke's Estate* (1913), 66 Or 252, 134 Pac 11—Douglas
- Simpson v. Durbin* (1914), 68 Or 518, 136 Pac 347—Marion*
- Wendl v. Fuerst* (1913), 68 Or 283, 136 Pac 1—Marion
- Ely's Estate* (1915), 74 Or 561, 146 Pac 89—Clackamas
- Diggin's Estate* (1915), 76 Or 341, 149 Pac 73—Wallowa*
- Darby v. Hindman* (1916), 79 Or 223, 153 Pac 56—Baker

- Rowell's Estate* (1916), 80 Or 617, 157 Pac 1064—Lincoln
- Will of King* (1918), 87 Or 236, 170 Pac 319—Multnomah
- Melhase v. Melhase* (1918), 87 Or 590, 171 Pac 216—
Klamath
- Dunn's Will* (1918), 88 Or 416, 171 Pac 1173—Yamhill*
- Sullivan v. Murphy* (Apr. 1919), 92 Or 52, 179 Pac 680—
Multnomah
- Dale's Estate* (Apr. 1919), 92 Or 57, 179 Pac 274—Mult-
nomah*
- Sturtevant's Estate* (1919), 92 Or 269, 178 Pac 192—Uma-
tilla*
- Collins v. Long* (1920), 95 Or 63, 186 Pac 1038—Linn*
- Rice v. Rice* (1920), 95 Or 559, 188 Pac 181—Wasco*
- Gault's Will* (1921), 99 Or 621, 196 Pac 254—Multnomah*
- Johnson's Estate* (1921), 100 Or 142, 196 Pac 385—Mult-
nomah
- Pittock's Will* (1921), 102 Or 159, 199 Pac 633—Mult-
nomah*
- Failing's Will* (1922), 105 Or 365, 208 Pac 715—Mult-
nomah
- Phillips' Will* (1923), 107 Or 612, 213 Pac 627—Clackamas
- McCracken v. McCracken* (1923), 109 Or 83, 219 Pac 196—
Washington
- Estate of Neil* (1924), 111 Or 282, 226 Pac 439—Jackson
- Laberee v. Laberee* (1924), 112 Or 44, 227 Pac 460—Klam-
ath*
- Moore's Estate* (1925), 114 Or 444, 236 Pac 265—Mult-
nomah*
- Estate of Allen* (1925), 116 Or 467, 241 Pac 996—Wallowa*
- Estate of Meaverne* (1926), 118 Or 308, 246 Pac 720—Wal-
lowa*
- Estate of Riggs* (1926), 120 Or 38, 241 Pac 70—Multno-
mah*
- Carr's Will* (1927), 121 Or 574, 256 Pac 390—Multnomah*

- Shepherd's Will* (1927), 121 Or 619, 256 Pac 1119—Multnomah*
- Estate of Shaff* (1928), 125 Or 288, 266 Pac 630—Marion
- Clark v. Clark* (1928), 125 Or 333, 267 Pac. 534—Multnomah
- Estate of Severson* (1928), 125 Or 545, 267 Pac 396—Lane*
- Estate of Engle* (1929), 129 Or 77, 276 Pac 270—Marion
- Stephensen's Estate* (1930), 132 Or 234, 285 Pac 224—Marion
- Kober's Will* (1930), 132 Or 421, 285 Pac 1032—Clackamas
- Wayne's Estate* (1930), 134 Or 464, 291 Pac 356—Multnomah*
- De Lin's Estate* (1930), 135 Or 8, 282 Pac 119—Multnomah
- De Hass' Will* (1931), 135 Or 392, 296 Pac 42—Multnomah*
- Linville's Estate* (1931), 137 Or 145, 300 Pac 505—Multnomah*
- Morely's Estate* (1931), 138 Or 75, 5 P2d 92—Marion*
- Warren's Estate* (1932), 138 Or 283, 4 P2d 635—Clackamas
- Miter's Estate* (1932), 141 Or 17, 14 P2d 996—Multnomah*
- Edward's Estate* (1933), 141 Or 595, 17 P2d 570—Multnomah*
- Flanders v. White* (1933), 142 Or 375, 18 P2d 823—Multnomah
- Snyder v. De Remer* (1933), 143 Or 414, 22 P2d 877—Yamhill
- Fletcher's Will* (1934), 147 Or 139, 32 P2d 123—Multnomah
- Carlson's Estate* (1935), 149 Or 314, 40 P2d 743—Multnomah. Same as 153 Or 327 and 156 Or 597
- Knutson's Will* (1935), 149 Or 467, 41 P2d 793—Multnomah*
- Kelly's Will* (1935), 150 Or 598, 46 P2d 84—Multnomah*
- Dougan's Estate* (1936), 152 Or 235, 53 P2d 511—Multnomah

- Rupert's Estate* (1936), 152 Or 649, 54 P2d 274—Multnomah*
- Bundy's Estate* (1936), 153 Or 234, 56 P2d 313—Marion
- Carlson's Estate* (1936), 153 Or 327, 56 P2d 347—Multnomah (Same case in 149 Or 314 and 156 Or 597)
- Carlson's Estate* (1937), 156 Or 597, 68 P2d 119—Multnomah (On final acc't; not will contest)
- Mitchell's Estate* (1938), 158 Or 375, 76 P2d 283—Multnomah*
- Vantine v. Vantine* (1938), 159 Or 183, 76 P2d 1122—Multnomah*
- Lilly's Estate* (1938), 159 Or 236, 78 P2d 567—Multnomah*
- Johnson's Estate* (1939), 162 Or 97, 91 P2d 330—Multnomah*
- Brown's Estate* (1941), 165 Or 575, 108 P2d 775—Klamath*
- Demaris' Estate* (1941), 166 Or 36, 110 P2d 571—Umatilla
- Lambert's Estate* (1941), 166 Or 529, 114 P2d 125—Jefferson
- Shanks' Estate* (1942), 168 Or 650, 126 P2d 504—Union
- McGreal v. McGreal* (1943) 172 Or 337, 141 P2d 828—Multnomah
- Davis' Will* (1943), 172 Or 354, 142 P2d 143—Multnomah
- Bond's Estate* (1943), 172 Or 509, 143 P2d 244—Multnomah
- Courtney's Will* (1943), 172 Or 657, 143 P2d 910—Multnomah*
- Murray's Estate* (1944), 173 Or 209, 144 P2d 1016—Clackamas
- Lobb's Will* (1944), 173 Or 414, 145 P2d 808—Multnomah* (Second Appeal, 177 Or 162)
- Dickerson v. Murfield* (1944), 173 Or 662, 147 P2d 194—Multnomah. ("suit * * * to vacate the probate" of a will)
- Cook's Estate* (1944), 174 Or 207, 148 P2d 790—Multnomah* (Pipes judge pro tem—new trial)

- Wade's Estate* (1944), 174 Or 531, 149 P2d 947—Benton*
- Provelt's Estate* (1944), 175 Or 128, 151 P2d 736—Josephine
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- Perry's Estate* (1947), 181 Or 332, 181 P2d 783—Umatilla*
- Van Vlack v. Van Vlack* (1947), 181 Or 646, 182 P2d 969,
185 P2d 575—Union
- Christofferson's Estate* (1948), 183 Or 75, 190 P2d 928—Marion*
- Massey's Estate* (1949), 187 Or 40, 208 P2d 341—Umatilla
- Newman's Estate* (1950), 187 Or 641, 213 P2d 137—Lake*
(First appeal; second appeal in 196 Or 376)
- Jackson's Estate* (1950), 189 Or 328, 220 P2d 96—Multnomah*
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- Meier's Estate* (1950), 190 Or 140, 224 P2d 572—Marion*
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- Congy's Estate* (1955), 204 Or 512, 284 P2d 758—Polk*
- Estate of James H. Miller* (1956), 206 Or 358, 269 P2d 524, 292 P2d 504—Marion*
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- Quaid Estate* (1958), 68 Or Adv. Sh. 183, 335 P2d 86—Multnomah

No. 16,175 /

United States Court of Appeals
For the Ninth Circuit

BARBARA LUELLA RIVERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEE.

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FILE

JAN 15 1959

PAUL P. O'BRIEN, C

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3 Underhill's Criminal Evidence, 5th Ed., 1957, §647		28

No. 16,175

**United States Court of Appeals
For the Ninth Circuit**

BARBARA LUELLA RIVERS,	} <i>Appellant,</i>
VS.	
UNITED STATES OF AMERICA,	} <i>Appellee.</i>

**Upon Appeal from the District Court for the
District of Alaska, First Division.**

BRIEF OF APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial and a verdict of guilty in the District Court for the District of Alaska, First Division, at Juneau, the Honorable Raymond J. Kelly presiding, of one count of murder in the first degree. Appellant was sentenced to life imprisonment. Appellant filed notice of appeal from the judgment and commitment and from the order denying a new trial.

Jurisdiction below was based on 48 U.S.C. §101, and in this court is based on 28 U.S.C. §1291.

STATEMENT OF CASE.

Appellant was convicted of murdering her husband, Paul Rivers, on the night of December 3rd or early morning of December 4th of 1957. She and her husband had arrived in Sitka, Alaska, on November 27, 1957, and were living in Room No. 10 in the Alaskan Hotel (R. 156).

On December 5, 1958, at about 11:30 p.m. appellant made an "anonymous" telephone call to the Sitka police department from the pay station in the Alaskan Hotel, stating that a man had been murdered, his body dismembered, and the parts thrown into the ocean (R. 4-5, 50-52, 158, 533-534). A search was made by the police officers on duty, and portions of a human body were found in a place where the tide had gone out (R. 10-12, 53-56). The parts found at that time were two lower legs, with toes cut off, one lower arm with fingertips missing, and a head in a pillowcase with the scalp, eyebrows, and lips removed, and a severed torso (R. 12, 55). Other help was summoned (R. 12), and investigation continued. About an hour after the telephone call appellant was seen near the Alaskan Hotel and upon being asked whether she had made a call to the police at 11:30, said that she had not (R. 13-14). Shortly after that she stopped some other officers and said that she had made a call about a dog, and questioned the officers about what had happened (R. 79, 81-82, 109-110).

At about 2:30 a.m., December 6th, the law enforcement officers went to appellant's room in the Alaskan

Hotel. She consented to them looking over the room, and at that time the officers saw no demonstrative evidence that appeared to be of value. When asked about her husband, Paul Rivers, appellant said that she had not seen him since December 3rd, about 10:00 at night, when he had left after having an argument (R. 16-20, 57-59, 83-85). Appellant later stated to witness Dankworth that she had last seen her husband at 9:30 a.m. on December 4th (R. 118-119). When the officers told appellant that a body had been found she volunteered to go to the morgue to see whether it might be her husband, and became quite insistent upon doing so (R. 19-20, 59, 85-86). When she got to the morgue and viewed the remains she became quite hysterical so that it was necessary to obtain medical attention for her. While waiting for the doctor appellant related some of the marks on her husband which would establish identification (R. 27-30, 60-63, 87-89). At 7:00 a.m. she was arrested for disorderly conduct (R. 93). She was arraigned on this charge at 3:00 p.m. December 6th and again at 3:45 p.m. December 7th (R. 94).

In the meantime the investigation continued. Additional pieces of the body were found, and a number of articles were found in Room 10 of the Alaskan Hotel, as well as in the surrounding area (R. 32-38, 42-43, 63-70, 111-113, 130, 140-144, 160-161).

A pathologist arrived in Sitka on December 7th, examined the remains that had been found (R. 213-221), and established the cause of death as an acute sudden asphyxiation (R. 222-227).

At 2:00 a.m. December 8th, the appellant, upon being confronted with some of the findings and being interrogated in the presence of several persons, made an oral statement that she had killed Paul Rivers, that she had put a string around his neck (R. 124-129, 198-199, 241-242), and that when she woke up on the morning of December 4th she found him dead. On December 9th at 2:00 p.m. appellant was charged with first degree murder, and was advised of her rights by the United States Commissioner (R. 95). On December 10th she signed a written statement (R. 150-152, 155-159, 202-203), entered in evidence as Exhibit No. 32.

At the trial the above matters were all brought out in the testimony of the witnesses. It was also shown that the victim, Paul Rivers, had been attended by a Dr. Knoll on the night of December 3rd, and the drugs given to him were explained (R. 257-273, 279-281, 299-303, 305-306, 361-366).

It was shown that, contrary to her story that she had been asleep from the late night of December 3rd till the morning of the 4th, she was in fact very active around the hotel, and her activities the next day were related (R. 423, 424-425, 429-432).

The head of the deceased, found with other large dismembered parts of the body, and the severed fingertips found behind the Alaskan Hotel were proved to be those of Paul Rivers (R. 35-38, 66-67, 205, 354-356, 79, 366, 370, 417). It was shown that stockings with stains on them and particles of blood, meat, and hairs were found below the window of the

room occupied by appellant (R. 32-33). One loose clothing label was found in her room (R. 141, 143). Articles of clothing were found in the water behind the Alaskan Hotel, some of which had stains on them and some of which had the labels and laundry marks cut out of them (R. 67-70). Numerous objects were found in appellant's room indicating that a dismemberment of the body had taken place there (R. 42-43, 63-64, 111-113, 130, 140-144, 160-161).

Wet sheets with blood stains on them were thrown down the clothes chute in the hotel the day after the homicide (R. 113, 392-394, 395-398, 399-405). She was seen carrying clothes out of the hotel after the homicide (R. 384). When asked by hotel employees about throwing the wet sheets down the clothes chute she said that her husband had had a bowel movement on the sheets and she had washed them out for that reason (R. 397-398, 404-405).

It was shown that she bought a cleaver type of fish knife at the hardware store the afternoon of December 4th (R. 379-381). Appellant later directed the officers to the place where she had thrown the knife in the water, and it was recovered (R. 95-99, 71-73).

One witness testified that appellant told him on the 4th and again on the 5th of December that Paul Rivers was sick in bed (R. 373-375, 375-377). She told another witness the same thing on December 5th (R. 367-368).

Psychiatric testimony bearing on appellant's sanity was adduced (R. 330-352).

Appellant testified at length about various marital troubles that had taken place between her and Paul Rivers, and stated that she had tied a piece of string around his neck in the late night of December 3rd because she was afraid he would wake up during the night and harm her, that she went to bed and did not wake up until morning, whereupon she found her husband dead, and, that being frightened because it might appear that she had intentionally killed him, she dismembered the body and disposed of it (R. 437-521).

Medical testimony was also presented on behalf of appellant (R. 568-595).

SUMMARY OF ARGUMENT.

I. It was not error for the court to foreclose appellant's counsel from asking a particular question of the prospective jurors on voir dire examination.

II. It was not error for the court to admit into evidence Exhibits Nos. 14, 18, and Exhibits Nos. 35 through 41.

III. The verdict is fully supported by the evidence.

IV. The length of the court sessions during appellant's trial did not constitute error.

V. The trial court properly excluded testimony concerning the character of the deceased and was justified in instructing the jury not to consider the doctrine of self-defense.

VI. It was not error for the court to give Instruction No. 12.

VII. The court's Instruction No. 25 that evidence of prior inconsistent statements of the accused are not sufficient of themselves to prove guilt was a correct and proper statement of the law.

VIII. The admission of testimony about oral statements made by appellant was not error.

IX. There was no reversible error in admitting into evidence various articles taken from Room No. 10 of the Alaskan Hotel.

ARGUMENT.

I. IT WAS NOT ERROR FOR THE COURT TO FORECLOSE APPELLANT'S COUNSEL FROM ASKING A PARTICULAR QUESTION OF THE PROSPECTIVE JURORS ON VOIR DIRE EXAMINATION.

The court did not foreclose appellant's counsel from questioning the prospective jurors about their possible racial prejudice as it might affect their consideration of the case. What counsel is complaining of is the denial of the right to ask the particular question put. The question, "Would you object to a negro living in an apartment next to yours," was one which the court in its sound discretion had the power to control.

All voir dire questioning is under the control of the court by virtue of Rule 24, F.R.Cr.P., and considerable discretion is vested in the trial judge as to the extent of such questioning. *Fredrick v. United States*, 163 F.2d 536, 550 (9 Cir. 1947), cert. den. 332 U.S.

775; *Speak v. United States*, 161 F.2d 562, 563; *United States v. Dennis*, 183 F.2d 201, 226-228 (2 Cir. 1950), affirmed 341 U.S. 494; *Butler v. United States*, 191 F.2d 433, 435 (4 Cir. 1951); *Hamer v. United States*, 259 F.2d 274 (9 Cir. 1958). It is possible, in fact not unlikely, that a juror might object to a negro living next to him in an apartment but would still be able to afford a negro a fair trial. It should not be presumed that jurors who in every respect have been adequately examined on voir dire will violate their oaths and the instructions of the court.

The cases cited by the appellant do not apply to the situation at bar. In *Aldridge v. United States*, 283 U.S. 308 (1931); *State v. McAfee*, 64 N.C. 339 (N.C. 1870), and *State v. Higgs*, 120 A.2d 152 (Conn. 1956), the defendants' convictions were reversed because they had been entirely foreclosed from inquiring into the possible racial prejudice of prospective jurors. Appellant states that the extent of the voir dire examination concerning racial prejudice is subject to considerable variation (p. 16 of appellant's brief), but he cites no case and our research reveals none in which a conviction was reversed for any restriction of the voir dire examination short of a complete denial of questioning on that subject. See 54 ALR 2nd 1204.

Appellant's counsel is not claiming that he was in any other respect hindered from conducting a proper and searching voir dire examination, or that the court excluded any other form of question relating to possible race prejudice. It is difficult to see how the

exclusion of this one question, without more, could constitute reversible error.

II. IT WAS NOT ERROR FOR THE COURT TO ADMIT INTO EVIDENCE EXHIBITS NOS. 14, 18, AND EXHIBITS NOS. 35 THROUGH 41.

The burden of appellant's argument is that the above-mentioned exhibits should not have been admitted in evidence because (1) they were inflammatory and gruesome, (2) they were irrelevant, and (3) defense counsel was willing at trial to stipulate to many of the facts that the exhibits were used to demonstrate.

A considerable part of appellant's brief on these points consists of matters that would be proper jury argument but which have little to do with the questions of law arising in the case. For convenience, the three forms of demonstrative evidence objected to will be taken up below, although the arguments tend to overlap in certain instances.

A. Exhibit No. 18: The jar containing severed fingertips of the deceased.

During the search to recover parts of the dismembered body of the deceased some fingertips were found behind the Alaskan Hotel in Sitka (R. 35-38, 66-67, 205), which had been occupied by the defendant and the deceased until the killing. Witness Dankworth testified that he obtained fingerprints from these parts by rolling them on a standard fingerprint card (R. 119-122) and transmitted it to his superiors (R. 161).

The fingerprint card was admitted in evidence as Exhibit No. 17, which was later connected up by witnesses Mayfield (R. 209) and Hippensteel, the FBI fingerprint examiner (R. 354). The examiner testified (R. 354-356) to the identity of the prints with those found on Exhibit No. 42 (also No. 23 for identification), which was a fingerprint card of the deceased already on file with the FBI, containing a photograph of Paul Rivers. The photograph on Exhibit No. 42 showed a mole on the face which corresponded with a mole visible in several of the photographs of the dismembered head of the body found by the enforcement officers. The person whose photograph appeared on Exhibit No. 42 was identified by four witnesses as the Paul Rivers they knew in Sitka, Alaska, during the week before the dismembered body was found (R. 79, 366, 370, 417).

The fingertips were thus an integral part of a chain of evidence leading to the identification of the victim, proving also that a dismemberment of the victim had occurred, and that certain of the dismembered parts had been disposed of behind the hotel occupied by the appellant. The exhibit was relevant in that it aided in the establishing of both the corpus delicti and identity, the burden of proving which rested squarely on the government. Exhibit No. 18 supported the testimony of the witnesses that the fingertips were in fact found, and that they were the very fingertips from which fingerprints were obtained. Like most demonstrative evidence, it gave authenticity to the oral testimony. Without the exhibit the testimony could have

been attacked on the grounds that the fingertips and the prints taken from them were fictitious, that there was uncertainty about the custody of the fingertips after they were found, or that the fingertips were in such condition that fingerprints could not have been obtained from them.

The fact that the fingertips, preserved in formalin in a glass jar, were part of the deceased's body is no ground for their exclusion. In addition to the cases cited later in this brief dealing with the problem of inflammatory photographs, the following homicide cases are ones in which the reception in evidence of parts of the human body has been upheld: *Thrawley v. State*, 55 NE 95 (Ind. 1889); *Savary v. State*, 87 NW 34 (Neb. 1901); *State v. Gaines*, 258 P. 508 (Wash. 1927), writ of error dismissed and cert. den. 277 U.S. 81; *State v. Rodriguez*, 167 P. 426 (N.M. 1917); *State v. Byrne*, 199 P. 262 (Mont. 1921), holding it proper to submit the skull of the deceased to the jury; *State v. Wieners*, 66 Mo. 13, 29 (Mo. 1877); *Turner v. State*, 15 SW 838 (Tenn. 1891), holding it permissible to introduce vertebral bones and ribs. In *State v. Vincent*, 24 Iowa 570 (Iowa 1868), when the victim's body was found the head had been severed from it. A physician preserved the head in alcohol, and at the trial the head was exhibited to the jury. Various witnesses identified the head as that of the deceased. The court apparently felt that no impropriety was involved in that procedure.

In the case at bar it is highly unlikely that the jury would disregard the instructions of the court

and find appellant guilty because of the introduction of this exhibit. Its role was a minor one, but, like all circumstantial evidence, important in its relation to the other facts in the case.

It should be noted that appellant's counsel made no motion to strike the exhibit at the close of the evidence, a procedure which was open to him if he felt that the exhibit was irrelevant or prejudicial to the appellant.

B. Exhibit No. 14, the box of clothing.

Witness Greenhalgh testified that a few days after the homicide he found assorted articles of clothing in the water on the beach behind the hotel occupied by appellant (R. 67). Some of the clothes had stains on them, and some had the labels and laundry marks apparently cut out of them (R. 68-70).

Appellant's argument seems to go to the evidentiary weight to be given to the exhibit rather than its admissibility. A trier of fact might have attached no significance to the clothing with the labels removed. But it could also be rationally inferred that such clothing, found where other portions of the body were found, had been dumped in the water by appellant in an effort to destroy evidence of a crime having been committed. As such it was entitled to be considered by the jury.

When the exhibit is considered with the other evidence in the case it is an understatement to say that it had some materiality. Stocking-shoes with stains on them and particles of blood, meat, and hairs were

found below the window of the room occupied by appellant (R. 32-33). One loose clothing label was found in her room (R. 141, 143). Fingertips, a toe, and an upper arm were found on the beach behind the hotel (R. 35-38, 66-67). Numerous objects were found in appellant's hotel room indicating that a dismemberment of the body took place there (R. 42-43, 63-64, 111-113, 130, 140-144, 160-161). She was seen carrying some clothes out of the hotel after the homicide (R. 384). Wet sheets with blood stains on them were thrown down the clothes chute in the hotel the day after the homicide (R. 113, 392-394, 395-398, 399-405).

Appellant now complains that the clothing was not shown to have belonged to the deceased. It was open to defense counsel to hand this clothing to appellant when she took the witness stand and have her testify concerning it, if that was desired, but this was not done. Counsel objected to the introduction of the exhibit but failed to state any recognizable reason for its exclusion, the objection in its entirety reading as follows:

“Well, your Honor, I am going to object to that. It seems to me that by searching a quarter of a mile of beach they could have picked up almost anything around that area.” (R. 71.)

It is unfair to the trial court to claim error when the court has not been apprised by a proper objection of the grounds upon which the evidence is claimed to be inadmissible. *Finnegan v. United States*, 204 F. 2d 105 (C.A. 8th 1953), cert. den. 346 U.S. 821; *Kreinbring v. United States*, 216 F. 2d 671 (C.A. 8th 1954).

C. Exhibits Nos. 35 through 41, photographs of the dismembered body of the homicide victim.

Appellant claims that there was no necessity to introduce these exhibits, which show various portions of the body of Paul Rivers during the post-mortem examination conducted by a pathologist who testified at trial, because either the facts proven by the photographs were not in dispute or counsel was willing to stipulate to the facts shown in them.

Defense counsel's offer to stipulate is of little consequence. A criminal trial becomes meaningless if the defendant can stipulate to all facts he does not want to have shown in evidence against him. The government is in no position in a criminal trial to stipulate to difficult fact patterns, nor can it very well determine in advance what quantum of proof will satisfy a jury beyond a reasonable doubt.

“Evidence of facts which in themselves are relevant to the guilt of the accused are not inadmissible because he admits, or offers to admit, that such facts are true. The right of the state to offer, and to have received, evidence which is relevant and material to the issue can not be taken away by such offer or admission.” *State v. Morgan*, 176 NW 35 (S.D. 1920), at 36.

Dean Wigmore's penetrating analysis of this problem is particularly helpful:

“Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or

evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial Court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances." 9 Wigmore, Evidence, 3rd Ed., §2591, p. 589. (Emphasis in the original.)

One of the leading cases on the admission of gruesome photographs is *Hawkins v. State*, 37 NE 2d 79 (Ind. 1941), a murder case. The objects shown in the admitted photographs were (1) the taxicab in which the crime had been committed, showing blood on the floor, (2) the decomposed body of the victim, lying in grass or weeds, with the hands tied behind the back, and (3) the skull of the victim, with skin and flesh removed, showing a hole and fracture in the skull. The defense counsel had offered to admit that the body was that of the alleged victim, and objected to the photographs on the grounds that they did not portray the taxicab or body in the condition they were in at the time of the crime, that they were admitted in evidence to prove that which was admitted by the defense, and that the gruesomeness of the pictures prejudiced the jury.

The court stated that the relevancy of such exhibits is determined by the inquiry as to whether or not a witness would be permitted to describe the objects photographed. Because there was no objection made to the testimony of all the facts shown in the photo-

graphs, the court held that there was no error in their admission. The court found no reason why a party should be limited in its presentation of facts. A witness may describe in words what he saw and also supplement his testimony with photographs, which frequently give a more accurate picture than the verbal description.

The fact that the defense had offered to stipulate the corpus delicti illustrated by the photos was also held not to be a ground for reversal. With the burden resting on the government of proving every element of its case, it is important for the government to be able to make its case in its own way. The evidence may be important in proving matters beyond the scope of the stipulation. The court also noted that at the time the defense counsel offered to stipulate no element of the crime was admitted by the defense. An admission of the corpus delicti was not an admission that the defendant was the person who had committed the offense.

On the issue of gruesomeness the court found no error. It pointed out that details more repulsive than those shown in the photos might legitimately have been told by witnesses, such as the stench of human flesh putrefying under a hot May sun.

There are many similarities between the *Hawkins* case and the case at bar. In the instant case the photographs went to prove identity, the concealing of a crime, the state of mind of the defendant, and the environment and pattern of the crime. Likewise, the admissions tendered by appellant's counsel at trial

were not admissions that the defendant had cut the body up, or that she did it to escape justice, or that it was the victim who was cut up, or that defendant was sane when she did such acts. Appellant's counsel did not object to the testimony about the dismembered body, but only the photographs that illustrated that testimony.

Instead of operating as a foundation for the exhibits, appellant claims that the testimony about the dismembered body eliminated the necessity for the introduction of the pictures. But it is interesting to see what other courts have said in similar situations. In *State v. Nelson*, 92 P. 2d 182 (Ore. 1939), although an eminent pathologist had already described a bullet wound in the back of deceased, using charts, plates and diagrams to illustrate his testimony, a photograph of the wound was admissible, despite its gruesome character. In *State v. Lantzer*, 99 P. 2d 73 (Wyo. 1940), a photograph of a murdered wife lying on her back in a pool of blood was held properly admitted, even assuming that the defendant would not contest the facts shown in the photograph. *State v. Woods*, 220 P. 215 (Utah 1923), was a prosecution for wife murder in which it was held that a photograph of a bedroom showing the burned body of the wife on a bed was admissible, even though it was a repetition of the oral testimony and was gruesome in nature.

Appellant complains that the photographs did not directly establish the cause of death, because they depicted a dismemberment that took place after death, and thus they were irrelevant. But the authorities

support the proposition that the other conduct of the accused accompanying the commission of a crime may be shown so that the jury will have an adequate understanding of what took place. In *Hicks v. State*, 11 NE 2d 171 (Ind. 1937), reh. den. 12 NE 2d 501, cert. den. 304 U.S. 564, the court found no error in admitting a photograph of the head and hands of deceased which had been cut off the body with a meat cleaver. The hands and head had been thrown in a pond far away from the torso in effort to destroy identity. The head had been badly beaten, bruised, and crushed. The nose was broken off and was barely attached to the face. The forehead was mashed and crushed in. There was a hole in the temple and one between the eyes.

In *Commonwealth v. Sydlosky*, 158 A. 154 (Pa. 1931), it was held proper to admit a photograph of a murdered baby which had been killed by garrotting, after which the hands and feet were cut off to prevent identification. The picture was in aid of the oral testimony in the case and also helped establish identity of the victim. *State v. Williams*, 192 NW 901 (Iowa 1923), was a prosecution of a negro for the murder of a woman school teacher. The body of the victim had been violated after death, and photographs of the body and head of the deceased were held admissible to show the environment of the offense and the motive for the crime.

State v. Fine, 164 A. 433 (N.J. 1933), was a murder in which the body was stuffed inside a trunk and shipped by express from Atlantic City to Philadel-

phia. The body was identified and it was undenied that death had been caused by strangulation, a rope having been used for that purpose. A series of photographs showing the trunk and the body were put in evidence over the objection of counsel. The court said:

“The fact that counsel could not see the purpose naturally does not make the photograph incompetent. We think it was both relevant and competent, as a question of identification and part of the evidence to establish the corpus delicti. It is true that there was other testimony as to whose body it was and how death had been caused, but the fact that this evidence was cumulative does not render it incompetent, nor does the fact that it happens to be gruesome and injects an element of horror into the case.” 164 A. at 434.

It is certainly not the horror conjured up by such exhibits that renders them inadmissible. In *State v. Smith*, 83 P. 2d 749 (Wash. 1938), a photograph of deceased's head, taken when the body was exhumed four months after death, was held proper. The danger in excluding evidence on the mere ground that it is inflammatory is that the more horrible the murder the more hampered would be the prosecution of those responsible. See *People v. Saenz*, 195 P. 442 (Cal. App. 1920). As the court in *State v. Aeschbach*, 153 A. 505 (N.J. 1931), in which an inflammatory photograph of the murder scene was held admissible, so aptly said:

“Carrying this contention to its logical conclusion, a court of first instance, on trial of an indictment for murder, is barred from admitting proof of any material fact which would tend to

inject an element of horror into the case, and so embitter and inflame a jury against the defendant, although without such proof the state would be unable to support the charge laid in the indictment. We conclude that this contention is without merit." 153 A. at 506.

In the case at bar the government had the burden of proving the identity of the dismembered body. The photographs show a mole on the face as well as other physical characteristics that match the victim. The mole on the face is also visible in Exhibit No. 42, the FBI fingerprint sheet on Paul Rivers, and this photo was declared by four witnesses (R. 79, 366, 370, 417) to be that of the Paul Rivers who lived in Sitka before the murder. From a mere verbal description of the mole on the dismembered head the jury would have had a greater foundation for doubt about the identity of the victim.

The exhibits demonstrated, together with all the other evidence, an attempt by appellant to destroy the identity of the deceased in an effort to escape detection. That is positive evidence of conduct showing guilty knowledge which the jury was entitled to consider. The evidence also showed that the large pieces of the body were disposed of in one area, while the portions relating to identity, such as eyebrows, scalp, fingertips and toes, were found in a place almost a half-mile away. The photographs went to the proof of that very important fact.

The exhibits bore upon the issue of sanity. They show a crude but effective dismemberment for the

purpose of escaping detection. When taken with the other evidence they lead to an inference of a cold-blooded disposition of the body and not an insane mutilation.

The photographs are corroborative of the fact that a cleaver was used to cut up the body. They also show what the pathologist had to work with in establishing the cause of death, and thus they explain why his findings were made as they were. They show that it was physically possible for the appellant to take these parts of the body out of the hotel room and dispose of them without being detected.

This catalog of reasons for the admission of these exhibits should suffice, but there are additional reasons why it was not error for the court to so act. Counsel for appellant did not move to strike the evidence at the close of trial. The court eliminated the possibility of the jury finding appellant guilty of murder because of the mere fact of dismemberment by giving Instruction No. 15, which reads as follows:

“The dismemberment of the body may be considered by you as bearing upon the question of malice, intent, and in connection with the possible consciousness of guilt, but the defendant is not charged here with any crime in connection with the act of dismembering the body.”

If anything, there is too much fear of juries being inflamed by various types of demonstrative evidence. A murder trial as lengthy as this one is conducted in an orderly fashion, and the gruesome details of the crime are developed and considered in what might

best be described as a clinical atmosphere, not one of muckraking. The jury was admonished throughout to consider the case on its merits and according to the evidence.

Apparently appellant believes that the more ghoul-ish the crime and the more cunningly it is perpetrated, the greater is the immunity from proof. It is submitted that such a principle is fundamentally wrong and erroneous.

III. THE VERDICT IS FULLY SUPPORTED BY THE EVIDENCE.

Reference is made here to appellee's statement of the case. As pointed out there, the jury had before it the evidence of the dismemberment of the body, the locations in which the body parts were found, the removal of identifying marks from the body, the conflicting stories told by the appellant after the killing, the written statement of appellant, medical evidence that the cause of death was sudden acute asphyxiation, psychiatric testimony on the issue of sanity, considerable circumstantial evidence of the appearance of the crime scene, evidence of the identity of the dismembered corpse, and the benefit of appellant's own testimony and demeanor on the witness stand.

Appellant claims that deceased might have died from drugs administered to the deceased shortly before his death. But these matters were fully developed during the trial and were resolved by the jury in favor of guilt.

IV. THE LENGTH OF THE COURT SESSIONS DURING APPELLANT'S TRIAL DID NOT CONSTITUTE ERROR.

Appellant claims that lengthened court sessions and a night session during the trial deprived her of a fair trial. The cases cited in appellant's brief do not support the proposition put forth. *State v. Belknap*, 19 SE 507 (W.Va. 1894), cited by appellant, holds that it was not error to have a night session during a criminal trial because there was no showing of how it prejudiced the rights of the accused. *State v. Smart*, 262 P. 158 (Mont. 1927), cited by appellant, held it error for the judge to refuse to correct a serious misstatement about the evidence in the case in the final argument of the prosecuting attorney, and noted that the length of the court session (which ran from 8 a.m. till noon, from 1:15 p.m. till 6 p.m., and from 7:15 p.m. till 10 p.m.) made the error more serious. The other citation given by appellant, 22 CJS 732-734, deals with the time to prepare in advance of trial and is clearly inapplicable.

A trial court in the exercise of its discretion may hold longer sessions than is customary, if the rights of the accused are not prejudiced thereby. *State v. Evans*, 25 SE 2d 492 (S.C. 1943). In a murder case, *Bingham v. State*, 165 P. 2d 646 (Okla. 1946), the court said that before a verdict should be set aside because of night sessions during trial it must be clearly shown that such action resulted prejudicially to the defendant and constituted an abuse of discretion.

It is submitted that in the case at bar there is nothing, with the exception of the assertions of counsel

made in their briefs, to indicate prejudice to the defendant arising from this cause. The objection of counsel (R. 510) is nebulous and states no concrete reasons why a night session should not be held, and no statement or showing of the harm resulting to counsel can be found in the record. It is patently unfair to the trial court to claim error on appeal by statements dehors the record when the court was not given an adequate opportunity to perceive the claimed error.

V. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY CONCERNING THE CHARACTER OF THE DECEASED AND WAS JUSTIFIED IN INSTRUCTING THE JURY NOT TO CONSIDER THE DOCTRINE OF SELF-DEFENSE.

Error is claimed in the exclusion of evidence concerning the character of Paul Rivers and the court's instruction that the doctrine of self-defense was not applicable. For convenience these related topics will be treated as one.

A. The doctrine of self-defense did not apply.

The court's definition of the doctrine of self-defense in Instruction No. 14 is clearly in accord with the authorities in Alaska and throughout the United States. Compare *Owens v. United States*, 130 F. 279, 280-283 (9 Cir. 1904), an appeal from the Third Judicial Division of the District of Alaska; 26 Am. Jur., Homicide, §126; and Moreland, *The Law of Homicide*, p. 259 (1952), with the language used by the trial judge:

“The doctrine of self-defense may be invoked by one who, having been assaulted by another, reasonably believes himself to be in imminent danger of death or of receiving great bodily harm, and who uses whatever force is necessary to prevent such harm.”

It is equally clear that the doctrine had no application in this case. Mrs. Rivers testified that a fight took place in their room on the night of the killing, and after describing the manner in which she placed her husband on the bed and his final abusive remarks to her (R. 488), she stated:

“I was afraid he would wake up before me.

“So, around this pasteboard box in the room was some string that he had wrapped the boxes to take to Juneau, to take to Sitka from Juneau. These pieces of string I had put in the dresser drawer, and I thought to tie his hands so, if he did awaken, he wouldn't kill me, and I was scared to death. Then I thought that, if I didn't tie him otherwise, he would probably raise up and untie his hands, so I got a short piece of string and I brought it around his neck and I crossed it here, and it was an iron bed and it had round rods in it, like that, and I took it and tied it around the back of the rod, and I tied his hands together.”

Therefore it was affirmatively shown that the deceased had committed no overt act from which the appellant could have reasonably apprehended imminent danger to herself.

An analogous case is *Morrell v. State*, 34 So. 208 (Ala. 1903), wherein the deceased, angered by his

wife's failure to have dinner prepared when he arrived home, loaded a gun in the wife's presence and directed her to finish attending to their child, after which he intended to kill her and himself. The husband lay down on a pallet on the floor with the gun beside him and continued to abuse her verbally. Later, after he had fallen asleep, the wife picked up the gun, stepped back and shot her husband fatally. In affirming the wife's conviction of first degree murder the court said:

"The undisputed evidence shows the deceased, when shot, was either asleep, or was lying down quietly; that he was then making no hostile demonstration toward the defendant; and that the defendant had opportunity to escape from any immediate danger she may have had reason to apprehend. Under such evidence no question of self-defense arose . . ." 34 So. at p. 208.

In addition, the theory of the defense was that Paul Rivers' death was accidental (R. 488-493), and this court held such a theory to be inconsistent with self-defense in *Itow v. United States*, 223 F. 25 (9 Cir. 1915), appeal dismissed 233 U.S. 581.

The present case is similar in some respects to the case of *State v. Rawley*, 74 SE 2d 620 (N.Car. 1953). The defendant, while engaged in a fight with her boy friend, seized a knife and killed him. She testified that she did not consider the danger grave enough that it was necessary for her to "cut him," but that he had accidentally fallen on the knife. The trial court's instruction that the doctrine of self-defense

had no application under the facts of that case was approved.

In view of the testimony of the appellant, which precludes any claim of self-defense in this case, the court properly stated in Instruction No. 14 that the doctrine of self-defense was not to be considered by the jury.

B. Evidence of the deceased's character was inadmissible.

Initially it should be pointed out that even if the appellant were correct on the substantive question of law involved, the offer of proof was inadequate to enable the trial court or this court to make a determination whether the offered testimony was admissible.

In *Wigmore on Evidence*, 3rd Ed., 1940, it is stated that

“The general principle is that the offer must be judged *exclusively by its specific contents* regarded as a whole. This principle leads to several consequences:

(1) If the evidentiary fact desired to be offered is in itself apparently irrelevant, or otherwise dependent on other facts for its admissibility, the offer must contain a statement of the *specific purpose*, or of all the *other facts necessary to admissibility*. . . .” Vol. I, §17, p. 319. (Emphasis in the original.)

Even in the absence of the other reasons for excluding evidence of the deceased's character, appellant would certainly be obliged to show specifically how

the evidence bears on the issue of intent, and that the incidents were not so remote as to have no probative value. But the only indication of what the evidence would have been was counsel's statement that it would "consist of evidence of assaults upon her, evidence of showing her degree of her fear toward him, and evidence of that particular sort, threats made against her" (R. 538, 539). Not even the approximate date of these incidents is suggested. We contend that the offer was therefore insufficient to enable appellant to allege error in its rejection.

But more importantly, the trial court correctly ruled that evidence such as that which was offered would be inadmissible in any event, in view of the facts of this case. The authorities on evidence are in accord that the character of the deceased in a homicide prosecution is immaterial unless a claim of self-defense is made and (1) there is a dispute as to whether the deceased or the defendant was the aggressor, or (2) evidence of such character would tend to establish the defendant's reasonable apprehension of imminent danger, based upon some overt act of the deceased. Wigmore, *op. cit.* §63 and §246; *McCormick on Evidence*, §160, 1954; 3 *Underhill's Criminal Evidence*, 5th Ed., 1957, §647; 1 *Wharton's Criminal Evidence*, 12th Ed., 1955, §217. See also *Andersen v. United States*, 170 U.S. 481 (1897); *Morrell v. State*, *supra*, 34 So. at pp. 208, 209; and *State v. Rawley*, *supra*, 74 SE 2d at pp. 623, 624. Since self-defense was not available to the appellant in this case, the trial court properly excluded evidence of Paul Rivers'

bad character. Wigmore states the reason for the foregoing rule as follows:

“... the unconditional and indiscriminate admission of such evidence is dangerous. The danger is, not only that the deceased's reputed character, once in evidence, will be appealed to as justifying the deliberate destruction by private hands of a detested malefactor, but also that, though no plausible situation of self-defense is otherwise evidenced, this evidence will be improperly used to confuse the issue as if there were real doubt about the necessity for defense and the apprehension of danger.” Vol. II, §246, pp. 46, 47.

Furthermore, even if a self-defense situation had existed, we believe that the proposed testimony was inadmissible because it was to consist of specific acts of misconduct of the deceased rather than his reputation for violence (R. 538, 539). There are no decisions from Alaskan courts defining the manner in which the deceased's character may be shown, but the weight of authority confines evidence of that nature to the reputation of the deceased for violence. The reasons for the rule are that (1) evidence of reputation is less likely to divert the jury's attention from the essential issues, (2) specific acts are not always typical of the deceased's conduct, and (3) the burden of refuting incorrect evidence of specific misconduct is often insurmountable. See *Burton v. State*, 163 SW 2d 160, 162 (Ark. 1942); *Newsome v. State*, 20 So. 2d 708 (Miss. 1945); *Andrews v. State*, 43 SE 852, 853 (Ga. 1903); *State v. Ronk*, 98 NW 334, 339 (Minn. 1904); *People v. Gaimari*, 68 NE 112, 116 (N.Y. 1903).

Even in the absence of the general rule excluding evidence of the deceased's character, the offered testimony would be objectionable on the ground of immateriality. The probative value of such evidence would indeed be slight, and when weighed against the possibility that it would confuse the jury, we submit that the latter consideration should prevail and the evidence should be held inadmissible. Similar offers of evidence have been rejected in *Simms v. United States*, 248 F. 2d 626 (D.C. Cir. 1957), cert. den. 355 U.S. 875, and *Sanford v. State*, 47 SE 2d 268 (Ga. 1948).

In the former case the defendant and two accomplices administered a fatal beating to the defendant's husband, and error was claimed in the exclusion of a hospital record which reflected that five months prior to the killing the defendant told a doctor or a nurse that her husband had pushed her through a window. The court stated:

“Whether or not her husband pushed her through a window in October is totally immaterial to the issue of his death resultant to a beating at her hands the following March.” 248 F. 2d at p. 630.

In the *Sanford* case, the deceased struck the defendant on the head with a milk bottle during an argument. Later the defendant returned to the deceased's house and killed him with a shotgun. He claimed to have been carrying the gun merely to protect himself in case of further violence. Following a conviction of murder, the defendant alleged error in the exclusion of evidence that he usually walked by the de-

ceased's house on his way to a cafe where he bought dinner for his invalid wife. The court stated:

"It is insisted that the exclusion of this evidence was hurtful and prejudicial to the defendant because it would show that he was on lawful business when passing near the home of the deceased and would tend to disprove the contentions of the State that the defendant went to the home of the deceased for the purpose of committing homicide.

"If the witness had been allowed to testify and if she had testified as claimed by the defendant, her testimony would not have proved the contentions of the defendant. The fact that it was the usual custom of the defendant to pass by the home of the deceased on his way to procure food for his invalid wife would not have been sufficient to show that he was near the home of the deceased on this particular occasion, armed with a shotgun, for that purpose." 47 SE 2d at p. 269.

For the foregoing reasons the trial court's ruling that evidence of the deceased's character was inadmissible should be upheld.

**VI. IT WAS NOT ERROR FOR THE COURT TO
GIVE INSTRUCTION NO. 12.**

The court gave Instruction No. 12, which reads as follows:

"Every person is presumed to be of sound memory and discretion, and this presumption must be given effect by you until the contrary is shown or until after a consideration of all the evidence you have a reasonable doubt as to the defendant's sanity."

After the instructions had been given to the jury, appellant objected to this instruction in the following language:

“Objection as to Instruction No. 12, that, when evidence of insanity is put into issue, it is up to the prosecution to prove sanity.” (R. 601.)

Now in the briefs of appellant the claim is shifted and it is said that the language “until the contrary is shown” amounts to prejudicial error. The objection at trial did not state distinctly the matter to which the appellant now objects, or the grounds of the objection as required by Rule 30, F.R.Cr.P., and accordingly the trial court was not given an opportunity to perceive the claimed error.

Irrespective of the fact that appellant’s objection was inadequate, the jury was correctly informed that if it had a reasonable doubt of the defendant’s sanity after a consideration of all the evidence they were bound to return a verdict of not guilty. Instruction No. 12 must be read in context with the other instructions. Instruction No. 1 admonished the jury to consider the instructions as a whole, while Instruction No. 4 defined the burden resting on the prosecution of proving beyond a reasonable doubt every element of the crime charged. Instruction No. 8 charged sanity as an element of first degree murder, and in the last paragraph of the instruction the court said:

“Therefore, *if you find from the evidence beyond a reasonable doubt* (1) that the defendant on or about the time and place charged in the indictment killed Paul Rivers, and (2) *that she was then*

and there of sound memory and discretion, and (3) that such killing was done purposely and with deliberate and premeditated malice, you should find her guilty of murder in the first degree. On the other hand, if you do not so find, or if all the foregoing elements have not been proved beyond a reasonable doubt, you cannot convict the defendant of murder in the first degree and you should then proceed to consider whether she may be guilty of murder in the second degree.” (Emphasis supplied.)

There is nothing in Instruction No. 12 which negates the prosecution’s burden of proof. It is consonant with the principles laid down in *Davis v. United States*, 160 U.S. 469 (1895), cited by appellant. It is submitted that the court did not err in giving this instruction.

VII. THE COURT’S INSTRUCTION NO. 25 THAT EVIDENCE OF PRIOR INCONSISTENT STATEMENTS OF THE ACCUSED ARE NOT SUFFICIENT OF THEMSELVES TO PROVE GUILT WAS A CORRECT AND PROPER STATEMENT OF THE LAW.

Instruction No. 25 concerning the appellant’s prior inconsistent statements was taken substantially from California Jury Instructions, Criminal, No. 30-A, and it has received judicial sanction in that state for a number of years.

As indicated in the Statement of Case, Mrs. Rivers made a number of inconsistent statements concerning her husband and the circumstances surrounding his death, and these were admitted into evidence for the purpose of showing a consciousness of guilt. Wigmore,

op. cit., Vol. II, §278; *People v. Wilkes*, 284 P. 2d 481, 484 (Cal. 1955); *People v. Moore*, 160 P. 2d 857, 860 (Cal. App. 1945); *People v. Gibson*, 149 P. 2d 25, 26 (Cal. App. 1944). If it is conceded that inconsistent statements are admissible against a defendant it is difficult to understand how the restrictive language, "but it is not sufficient of itself to prove guilt," could be prejudicial. The language which the appellant objects to is actually entirely favorable to her, and the government submits that appellant's interpretation is unreasonable.

VIII. THE ADMISSION OF TESTIMONY ABOUT ORAL STATEMENTS MADE BY APPELLANT WAS NOT ERROR.

Appellant, in one of the briefs filed on her behalf, claims error in the admission of testimony about oral statements made by her around the hour of 2:00 a.m., December 8th (R. 124-129, 198-199, 241-243). In the first place these statements are not a confession. The mere phrase, "I killed him," does not amount to a complete or even partial acknowledgment of guilt by appellant. That is the only way in which the oral admissions attributed to her on that occasion vary materially from the written statement admitted in evidence as Exhibit No. 32 without objection (R. 155). Secondly, no objection to this testimony was made at trial.

Appellant suggests now that the circumstances under which the admissions were obtained were suspicious and that undue advantage may have been taken of her. The record shows what took place dur-

ing the interview by Officer Dankworth. Appellant had requested to see Dr. Beirne, the pathologist, when he returned from making his post-mortem examination (R. 124). He did not return until 1:30 a.m., shortly after which appellant was brought into the United States marshal's office. A deputy marshal, an officer of the Territorial Police, an agent of the United States Fish and Wildlife Service, and Dr. Beirne, an independent physician not connected with law enforcement, were present the whole time (R. 125, 241-243). She acknowledged that she had obtained advice from counsel (R. 125). The total interrogation did not consume over an hour (R. 198). Taken altogether, there is nothing legally or factually in the record to support a conclusion that the admission of this testimony was error, and this court should so rule.

IX. THERE WAS NO REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE VARIOUS ARTICLES TAKEN FROM ROOM NO. 10 OF THE ALASKAN HOTEL.

This point is raised in one of appellant's briefs. It should be noted that no motion for the return or suppression of any of the items objected to was made before trial under Rule 41, F.R.Cr.P. Other than a passing reference made by counsel in the course of a colloquy with the court (R. 145), there is nothing in the record indicating a necessity for a motion or hearing to determine whether this evidence should have been suppressed during the trial itself. Appellant did not include this claim of error in the statement

of points on which appellant intended to rely on appeal, nor is it included in the specification of errors in either brief filed by appellant, as required by Rule 17 (6) and Rule 18 (2) (d) of this court.

But if this court feels inclined to consider the claim, an analysis of the record should be of help. The first objection to the introduction of the evidence taken from Room 10 of the Alaskan Hotel was made to Exhibit No. 16, a broken knife found in the room. The objection was on the ground that no foundation had been laid that the article had been legally seized:

“Object to it, your Honor. I don’t believe this should be introduced in evidence until the proper foundation has been made that this was legally seized. There was no arrest at this time, only an investigation.” (R. 92.)

This objection was overruled and the exhibit was admitted into evidence (R. 92). Before this time Exhibits No. 12 and No. 13, a throw rug and a piece of linoleum taken from the room, had been received in evidence without objection (R. 43).

A two-foot-seven-inch piece of string taken from the room was later offered in evidence (R. 130). Defense counsel objected as follows:

“Your Honor, I object to the string being received on the grounds that the string itself—Mrs. Rivers was so distraught at the time she couldn’t have positively identified it at that time.” (R. 131.)

This objection was overruled and the string was admitted as Exhibit No. 19. Subsequently a 13-foot

piece of string, a pair of scissors, a ball of string, a tablecloth, a clothing label, and a handkerchief were all identified as having been removed from the room (R. 140-144). When these items were offered in evidence appellant's counsel stated that there was no objection to any of them except the 13-foot piece of string (R. 144-146). During the course of his objection appellant's counsel stated that he moved to suppress any of the evidence concerning the string taken from the room, but this was coupled with a statement that the defendant would admit on the stand (as she did in fact, R. 488-490) that she used the string. Counsel did not apprise the court at that or any other time that he desired a hearing in order that the propriety of the seizure of any articles in Room 10 could be determined. The 13-foot piece of string was admitted as Exhibit No. 25 (R. 144). The lack of objection on the grounds of search and seizure to the other items taken from the room and admitted in evidence (Exhibits Nos. 12, 13, 19, 26, 27, 28, 29, and 30), would make the harm to defendant minimal at best.

Finally, any error that might have arisen by admitting either Exhibits No. 16 or No. 25 was rendered harmless and was cured by the testimony of appellant and the witness Gladys Maxwell. Appellant testified to the string being in the room (R. 488-490), that she put deceased's body in a box and took it to a bridge (R. 494, 514), that she bought Exhibit No. 31, a cleaver (R. 495, 529), that the broken butcher knife, Exhibit No. 16, was in the room and had already been

broken by Paul Rivers (R. 495), that she remembered carrying a box down to the beach (R. 496), that she remembered some parts of the body being on the floor of the room and awakening beside them (R. 528), and that she had told the police where to find the dismembered body (R. 534). All of this supported the conclusion that she had used the string on her husband and that she had done something in connection with the disposal of the body in the room.

Appellant called Gladys Maxwell as a witness and she testified that appellant told her in jail shortly after her arrest that she had used a string to tie her husband's hands and neck (R. 547-548) and that she had used the broken knife, Exhibit No. 16, in dismembering the deceased's body (R. 548).

In *Paddy v. United States*, 143 F. 2d 847 (CCA 9th 1944), this court had before it the same question. This was a homicide case in which it was claimed that a holster and two bottles of whiskey admitted into evidence over objection were obtained by an unlawful search and seizure. This court held that even if it were assumed that the evidence should not have been admitted, the appellant's later voluntary testimony concerning the exhibits made their introduction harmless error. 143 F. 2d at 853. To the same effect are *Libera v. United States*, 299 F. 300 (CCA 9th 1924), and *Temperani v. United States*, 299 F. 365 (CCA 9th 1924).

It follows that in the case at bar no reversible error was committed in respect to the introduction of the complained about exhibits.

CONCLUSION.

Appellant has had a trial free from prejudicial error. She was proved guilty beyond a reasonable doubt. The judgment of the court below should be affirmed.

Dated, Juneau, Alaska,
December 22, 1958.

Respectfully submitted,

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No. 16176 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS FIANO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILE

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PAUL P. O'BRIEN, C

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No. 16176
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

LOUIS FIANO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging the appellant guilty of a one count indictment charging the sale and facilitation of 17 ounces, 150 grains of heroin in violation of Title 21, United States Code, Section 174.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

STATUTE INVOLVED.

Unfortunately appellant has misstated Section 174 of Title 21, United States Code. That statute provides in pertinent part as follows:

“Whoever . . . knowingly . . . receives, conceals . . . sells, or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

“Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

STATEMENT OF FACTS.

The events in this case properly begin in the early part of March of 1958 when Federal Narcotics Agent Stephan F. Giorgio, using the assumed name of Louis Di Stephano, entered Lucy's Restaurant in Los Angeles, California with a special employee and was introduced to Fiano by one Jeanne Haddad. [R. 48-49.]* After this meeting the agent returned to the restaurant on a number of occasions during which he became friendly with appellant. Giorgio and the appellant, who was employed at Lucy's, engaged in “general conversations” [R. 49] about

*The abbreviation “R.” refers to the Printed Record.

“the weather in New York” and “the old neighborhood” [R. 90] during the agent’s visit to the restaurant, but they did not discuss anything pertaining to narcotics until March 26 of 1958. [R. 110.] On the last-named date Giorgio arrived at Lucy’s in the early afternoon, had his car parked by the attendant, entered the restaurant, and met the defendant. [R. 50.] The two men sat down at a table in the back of the restaurant and engaged in a general conversation. [R. 51.] Fiano then asked the agent if he was interested in buying a woman’s cocktail watch for his wife. [R. 51, 96-97.] The defendant informed Giorgio that the watch was valued at \$900, but that he was willing to sell it for \$200. To this Giorgio replied that the watch was very nice, but that he wanted to keep his money for his “action.” [R. 51.] After much persistence on the defendant’s part in asking Giorgio what his “action” was, the agent finally told defendant that he was a “pusher.” [R. 52.] An inquiry was made by Fiano as to how much narcotics Giorgio could “push,” and when the agent said “half a kilo a week,” the defendant told him not to bother with it unless he could push at least one kilo per week. [R. 52-53.] The defendant did, however, discuss prices of the commodity with Giorgio, informing the latter that a kilo would cost \$15,000—\$14,000 for Fiano’s “people” and \$1,000 for himself. [R. 53.] The two men haggled over this price for a few minutes before Giorgio left the restaurant with the parting words to Fiano that he would consult “his (Giorgio’s) people” about the price. [R. 54.]

The next day, Giorgio received a telephone call from appellant, who asked Giorgio to come to the restaurant. After arriving at Lucy’s at approximately 3:00 p.m. Giorgio was escorted by Fiano to a table where the latter informed the agent that he was going to check him out before dealing. [R. 56.] The defendant then queried

Giorgio about his background in New York, his acquaintances, and his relationship with the special employee, "Teddy." [R. 56-57.] The conversation again turned to the proposed sale of narcotics when Fiano asked the agent how much money he could raise and when he could raise it. After telling the defendant that he could raise \$7,500 in a few days, Giorgio left the restaurant. [R. 58, 60.]

Agent Giorgio again received a telephone call on March 28 from appellant and shortly thereafter drove to Lucy's to meet Fiano. [R. 61.] After arriving at the restaurant Fiano and Giorgio walked out to the parking lot where the defendant once again queried the agent about his background, his neighborhood, and also asked him if he knew various racketeers in New York. [R. 63.] It was on this occasion that Giorgio gave Fiano the name and telephone number of Bobby Childs so that the defendant could check up on Giorgio. [R. 64-65.] After two unsuccessful attempts by Fiano to reach Childs in New York via telephone, Giorgio left with the defendant's instruction to return that evening. When Giorgio did return at approximately 7:00 p.m., he was observed to enter the restaurant by officers Jackson [R. 144-145] and Jones. [R. 151-152.] During the time he was inside the restaurant both Giorgio and Fiano were seen talking together by Agent Lang to whom Fiano offered some barbecued shrimp. [R. 130.] On this occasion the defenedant again tried unsuccessfully to reach Bobby Childs in New York. [R. 69.] After assuring Fiano that he had the money for the narcotics, Giorgio left the restaurant. [R. 70, 131, 152.]

The next contact Agent Giorgio had with Fiano was on April 2, 1958 when the defendant telephoned Giorgio at approximately 12:30 p.m. The defendant told Giorgio to come to Lucy's later that evening and to bring the money

for the narcotics. [R. 71.] Pursuant to these instructions Giorgio drove to Lucy's [R. 71] and was seen entering the restaurant at 9:00 p.m. by surveilling officers. [R. 119, 145-146.] Once again Agent Lang was stationed inside Lucy's and observed Agent Giorgio enter the restaurant, meet Fiano, and walk out of sight to the rear of the restaurant with the defendant for about ten minutes. [R. 131-132.] During the period of time Fiano and Giorgio were alone together at the back of Lucy's, the defendant told Giorgio that Fiano's people had warned him about Giorgio, but that he had finally spoken to Bobby Childs and that he would do business with Giorgio anyway. [R. 72.] After being threatened by the defendant, Giorgio handed him the sum of \$7,500 for the narcotics. Fiano did not transfer the heroin to Giorgio at that time, however, but told Giorgio to "sit tight" and expect a telephone call within two weeks. [R. 73.] Though Giorgio expressed dissatisfaction at this arrangement he finally left the restaurant to await further communications from Fiano. [R. 74.]

The expected telephone call from Fiano came on the morning of April 7, 1958. Fiano told Giorgio to come to the restaurant because he wanted to introduce him to someone. [R. 74.] Giorgio immediately drove to Lucy's and for the first time in all his visits to the restaurant parked his car himself. Since he was in a hurry he parked the car in a rather odd angle across the white parking lines in Lucy's lot. [R. 75-76.] At this time—approximately 10:30 a.m.—Giorgio was seen by surveilling officers to enter the parking lot at Lucy's. [R. 119, 147, 153.] The agent was greeted by the defendant, who was standing near the kitchen door, and then the two men entered the restaurant where they sat down at a table and again discussed the proposed transaction. Fiano told Giorgio that

“his (Fiano’s) people” were going to take the agent’s car and that the heroin would “be under the front seat on the driver’s side.” [R. 78.] Fiano then left the agent’s presence for about fifteen minutes. During this absence from Giorgio, Fiano was observed by Agent Jones to come out of the restaurant into the parking lot and to approach the direction of Giorgio’s car, which was parked behind a wall which obstructed Jones’ view. [R. 154, 163.] Fiano was lost from view for about two minutes, after which time he reappeared and carefully scanned the entire area. [R. 154.] Fiano then re-joined Giorgio in the restaurant and asked the agent what he used to “cut” narcotics. [R. 78-79.] After discussing this for a few minutes, the defendant told Giorgio that his car had been returned and that the narcotics were under the front seat on the driver’s side. [R. 79.] Both the defendant and Giorgio walked into the parking lot where the agent noticed that his car was parked in the same position in which he had parked it. [R. 80.]* He entered the vehicle and drove off, leaving the defendant who was observed by other agents to carefully look up and down the street before reentering the restaurant. [R. 80, 154-156.] When Giorgio reached his apartment he found the narcotics under the front seat of his automobile on the driver’s side and carried the package into his apartment. [R. 81.] Agent Garberson arrived shortly thereafter and conducted a field test which indicated the package contained heroin. [R. 83.] A more thorough analysis by a chemist at a later date established that package contained approximately 17 ounces of pure heroin. [R. 44-45.]

*Surveilling officers testified that the automobile was not observed to have left the lot between the times Giorgio arrived and departed on April 7. [R. 147, 163.]

Agent Giorgio's next meeting with Fiano was at Lucy's Restaurant on May 12, 1958 at which time and place Fiano informed Giorgio that he was leaving town. [R. 84-85.]

After his arrest on May 14, Fiano identified Giorgio as Lou Di Stephano, one of his customers at Lucy's, when the latter confronted him at the Office of the Bureau of Narcotics. [R. 86.] Prior to his admission regarding Giorgio, Fiano had been fully advised of his constitutional rights by other agents. [R. 134-135.]

IV.

ARGUMENT.

A. The Alleged Error in Disqualifying Witnesses Blackburn and Fiano as Proponents of Certain Hotel Records.

The initial weakness in appellant's argument that the disqualification of John Blackburn and the defendant as proper custodians of hotel records constituted reversible error, is that the facts supposedly contained in such records were placed before the jury by the admission of other evidence of the same facts. In such cases, if there is error in exclusion of certain evidence, it is uniformly held that such errors are cured by admission of other evidence of the same facts.

Barshop v. United States, 192 F. 2d 699, 701 (5th Cir., 1951), cert. den. 342 U. S. 920;

Finn v. United States, 219 F. 2d 894, 901 (9th Cir., 1955);

Furlong v. United States, 10 F. 2d 492, 494 (8th Cir., 1926);

De Camp v. United States, 10 F. 2d 984, 985 (D. C. Cir., 1926);

Strada v. United States, 281 F. 2d 143 (9th Cir., 1922).

In the instant case, testimony that Fiano was in Las Vegas on March 28, 1958 was supplied by the defendant himself [R. 204-207], and by Major A. Riddell who testified not only that the defendant was in Las Vegas on March 28, 1958, but also as to the time and place he saw the defendant in Las Vegas on that date. [R. 238-239.] In addition Riddell testified that appellant gave him a "betting marker" in Las Vegas on the week-end of March 28, 1958. [R. 241, 246.] Another witness, Jeanne Haddad, testified that the defendant was not in Lucy's restaurant on March 28. [R. 179, 184, 185.]

Another glaring weakness, in appellant's allegation of error regarding the disqualification of witness Blackburn, is that no offer of proof was tendered by appellant regarding the evidence which Blackburn sought to introduce. Under such circumstances the question cannot properly be brought before an appellate court because

"in absence of an offer of proof, the ruling of the trial court is not reviewable."

Goldstein v. United States, 63 F. 2d 609 (8th Cir., 1933);

Cf. Hunt v. United States, 231 F. 2d 784, 787-788 (8th Cir., 1956);

MacDonald v. United States, 246 F. 2d 727 (10th Cir., 1957);

Elder v. United States, 202 F. 2d 465 (9th Cir., 1953).

It should also be noted that not only was no offer of proof made, but on the contrary, the exhibit was withdrawn by the appellant [R. 237.]

The question involved in the Court below was not qualifications of the records, but rather the competency and qualifications of the witness to introduce them. The de-

fendant, who had been to Las Vegas the week before the trial to procure such records [R. 227] obviously could not qualify as a proper custodian since he did not even work at the Tropicana Hotel. The Court's determination that Blackburn could not qualify as a proper custodian of the records in question was based upon the questions addressed to the witness, his hesitancy in answering the questions, and his general demeanor when he was testifying. Though Title 28, United States Code, Section 1732 does not outline the qualifications of proponents of business records, the case law indicates that a witness must have some special qualifications to introduce such records.

Turner v. United States, 202 F. 2d 523, 525 (9th Cir., 1953) (where "qualified officers" were proponents of the records);

United States v. Conquest, 148 Fed. Supp. 62, 64 (E. D. Pa., 1957) (witness was an officer of a corporation and the records were kept in his custody and control);

Jolley v. United States, 232 F. 2d 83 (5th Cir., 1956) (two witnesses who introduced business records had custody of such records).

Appellee submits that even though a proponent of business records is not technically an expert witness, he is at least analogous to an expert witness in that he should have qualifications an ordinary witness does not have. Thus, he must be able to testify to such procedures in preparing business records as to show that the records were made in the ordinary course of business and that it is part of the ordinary course of business to make such records (28 U. S. C. Sec. 1732). It would seem that the proper person to give such testimony is a so-called "custodian," a person under whose custody and control such records are kept.

The qualifications of such “quasi-experts” or “skilled” witnesses, it is submitted, is a matter to be determined by the trial judge in his discretion.

See:

Henderson v. United States, 218 F. 2d 14, 17 (6th Cir., 1955);

Troutman v. United States, 100 F. 2d 628, 633 (10th Cir., 1939).

Appellant argued in his brief that the “rejection of this exhibit had more than passing consequences” because Giorgio paid the defendant the money on March 28, 1958. However, Agent Giorgio did not testify that he paid Fiano \$7,500 on March 28, 1958, as appellant misstates on pages 3 and 20 of his brief. April 2, 1958 was the date on which Giorgio gave Fiano \$7,500 for the narcotics and April 7, 1958 was the date on which the narcotics were placed in Giorgio’s car. [R. 73, 80-81.] When the evidence is thus viewed correctly the significance which appellant attaches to this evidence diminishes appreciably.

In any event it would seem that it is not even necessary for the Court to reach the merits of appellant’s contention on this issue, in view of the admission of other evidence covering the same facts and appellant’s failure to make an offer of proof regarding the proffered hotel records.

B. The Trial Court Did Not Err in the Admission of Evidence During the Course of the Trial.

It is almost too elementary for the citation of authority that an objection to an allegedly improper question is necessary to preserve any claimed error on appeal.

Alvarado v. United States, 9 F. 2d 385, 386 (9th Cir., 1925);

Olender v. United States, 210 F. 2d 795, 800 (9th Cir., 1954).

All of the testimony of which appellant now complains went into the record without objection. Apparently appellant saw nothing harmful in such evidence at the time of trial. He cannot now complain, when he gave the trial court no opportunity to rule on the admissibility of those matters he now claims prejudiced his cause. As was succinctly stated by the Court in *United States v. De Marie*, 226 F. 2d 783, 788 (7th Cir., 1955):

“ . . . in absence of a valid objection made at the proper time, a party may not on appeal claim that the introduction of such evidence was error.”

Cf. Anthony v. United States, 256 F. 2d 50 (9th Cir., 1958).

This rule is especially true of hearsay evidence, which the appellant has singled out as chief object of attack in his discussion concerning the admission of certain testimony. In *United States v. Costello*, 221 F. 2d 668, 678 (2d Cir., 1954), the Court in a general discussion of hearsay evidence said that

“ . . . decisions . . . have again and again held that it may be as dependable a reliance at a trial as any other evidence; the only condition upon its use being that the opposite party shall not object to it.”

And when hearsay is admitted without objection,

“ . . . it is to be considered, and accorded its natural probative effect, as if it were in law admissible.”

Spiller v. Atchison, Topeka and Santa Fe Railway Company, 253 U. S. 117, 130;

Cf. Diaz v. United States, 223 U. S. 442;

Rosenberg v. United States, 195 F. 2d 583, 596 (2d Cir., 1952).

In addition it might be noted that on page 22 of appellant's brief wherein he cites a number of pages in the transcript alleged to contain hearsay testimony, a careful reading of most of those pages fails to reveal any hearsay recorded thereon. In fact his citation of error regarding the admission of hearsay on page 128 of the transcript is somewhat odd, since the questions reported therein were asked by his own attorney and did not elicit any hearsay statements from witness Garberson.

Since the matters of which appellant complained were more fully set out under the section of his brief dealing with prosecutor's misconduct appellee will discuss such matters more fully under that heading.

C. There Is No Merit to Appellant's Contention That He Was Denied a Fair Trial by the Participation of the Trial Judge in Questioning Witnesses.

During the course of the trial the judge asked questions of the witnesses of both the plaintiff and the defendant. In doing so, he carried out one of his duties in seeing that the jury was fully informed as to all the relevant facts in the case. The Court in *Batsell v. United States*, 217 F. 2d 257 (8th Cir., 1954) expressed the trial judge's function in this regard in the following language:

“ . . . In the trial of any case, the judge has the responsibility of seeing that justice shall prevail and to that end may question the witnesses and may even express his opinion with reference to their testimony, provided, of course, that he makes it clear to the jury

that they are the ultimate determiners of the facts in question.”

Cf. Callahan v. United States, 35 F. 2d 633 (10th Cir., 1929);

Goldstein v. United States, 63 F. 2d 609 (8th Cir., 1933);

Glasser v. United States, 315 U. S. 60, 82.

In the instant case, the Court not only brought out facts favorable to the accused [R. 196, 198, 81], but also protected appellant by objecting to the admission of testimony concerning the defendant's statements made to officers after his arrest. [R. 127.] To guard against the possibility that the jury *might* have thought he held an opinion, the trial judge instructed that:

“Any opinion of the judge as to the guilt or innocence of this defendant, if directly or indirectly expressed in these instructions or otherwise during the trial, you are at liberty to disregard, and it is not binding upon you, for, as stated in the beginning of these instructions, to the jury exclusively belongs the duty of determining the facts, but the law you must accept from the court, as correctly given to you in these instructions.” [R. 316-317.]

D. The Court Did Not Deprive Appellant of “A Full and Fair Trial and Due Process of Law” by Instructing One of the Jurors Not to Take Notes.

Appellant's failure to cite authority for the position he has taken regarding the judge's instruction to one juror not to take notes is somewhat indicative of the lack of merit inherent in this contention. With the reporter on hand to read testimony back to the jury, should a question regarding proceedings at the trial arise during the jury's deliberations, it is difficult to imagine how or in what way

the appellant was prejudiced by the judge's remark. If anything the judge's action was wise, since it is not difficult to conceive of a situation where one juror might incorrectly record testimony and during deliberations impress his or her interpretation of the facts on the other jurors by virtue of the argument that he or she had recorded certain testimony contemporaneously.

"The trial judge has the duty to supervise, direct, and control the proceedings in his court and his rulings will not be reversed in the absence of a clear abuse of discretion."

Brennan v. United States, 240 F. 2d 253, 262 (8th Cir., 1957).

E. There Was No Prejudicial Misconduct on the Part of the Prosecutor During the Course of Trial or Argument.

Initially, one of the great weaknesses in appellant's present position before this Court is that he himself did not think any of the questions or remarks of the prosecutor were improper at the time of trial, since he did not tender any objections to such questions or remarks when they were made. It is, of course, rather basic law that in order to preserve any alleged errors on appeal regarding the admission of evidence an objection to such evidence is essential.

Pratt v. United States, 225 F. 2d 23 (D. C. Cir., 1955);

Self v. United States, 249 F. 2d 32 (5th Cir., 1957);

Canton v. United States, 226 F. 2d 313 (8th Cir., 1955);

Olender v. United States, 237 F. 2d 859 (9th Cir., 1956).

The immediately preceding sentence may appear to be a mere restatement of the argument made with regard to the trial court's alleged errors in the admission of evidence and, in reality, they are part of the same seamless web, but appellant has dealt with the same errors more fully under this heading and therefore appellee will do the same for the Court's convenience.

Upon examination of appellant's charges of misconduct, it would appear that most of his allegations are more shadow than substance. For example, on lines 19 to 22 on page 31 of his brief, appellant states that the prosecutor asked a "question concerning one Frank Sica." [R. 85.] This allegation is incorrect in that it incorporates the answer into the question. The question was a general one which merely asked:

Q. Did you have a further conversation with him then?

In reply Agent Giorgio stated:

A. I did ask him rather casually to introduce me to Frank Sica. [R. 85.]

Needless to say the question did not concern Frank Sica. If the testimony was objectionable appellant should have made a motion to strike.

Appellant also appears to have made a slight misstatement when he alleges that "counsel for the government *asked for* and received hearsay evidence." (App. Br., p. 31, lines 13-14.)* In some instances the testimony now complained of consisted of defendant's conversations with the agent during the course of their negotiations regarding narcotics. [R. 73.] But most of the pages cited reveal not

*The abbreviation "App. Br." refers to the Appellant's Brief.

only that the prosecutor did not *ask* for hearsay evidence, but that there is no hearsay testimony recorded on those pages. [R. 82-83, 109-110, 112, 120-122, 145-146.] In any event, and at the risk of appearing repititious, it should once again be noted that there were no objections to the testimony recorded on the pages cited in appellant's brief, and therefore no error can now successfully be assigned to the admission of such testimony. A rule of evidence not invoked is waived. This is especially true of hearsay evidence.

United States v. Costello, 221 F. 2d 668, 678 (2d Cir., 1954);

Byars v. United States, 238 F. 2d 83, 84 (6th Cir., 1956);

Rosenberg v. United States, 195 F. 2d 583, 596 (2d Cir., 1952).

The questions about appellant's trip to Las Vegas the week before the trial were proper since they were inquiries into appellant's efforts to produce the witnesses who testified he was in Las Vegas on March 28, 1958 [R. 239-240]; and were also further inquiries into appellant's testimony which sought to establish his presence in Las Vegas on March 28, 1958, which he undoubtedly expected would be corroborated by certain hotel records and by the testimony of witnesses Haddad, who testified he was not in Los Angeles [R. 179], and Riddell who testified he was *in* Las Vegas on that date. The questions regarding his encounter and conversations with Las Vegas Police were part of the same general inquiry, and if there was any error in the wording of the question, the defendant's answer fully cured it and rendered the entire incident innocuous. [R. 226-227.]

Sistrunk v. United States, 162 F. 2d 188 (5th Cir., 1947);

Garber v. United States, 145 F. 2d 966 (6th Cir., 1944);

Todorow v. United States, 173 F. 2d 439, 448 (9th Cir., 1949);

Brennan v. United States, 240 F. 2d 253, 262 (2d Cir., 1957);

Alberty v. United States, 91 F. 2d 461, 463-464 (9th Cir., 1937);

United States v. Bando, 244 F. 2d 833, 846 (2d Cir., 1957).

In *Watson v. United States*, 234 F. 2d 42, 45 (D. C. Cir., 1956) (reversed on other grounds) the Court uttered the following words, which might well apply to the question here alleged as error:

“ . . . The question and answer here, however, seem to have been part of a rapid-fire series designed to demonstrate the falsity of appellant's testimony and thus to impeach his veracity, and not to have been intended to link appellant with another charge . . . ”

The Court need not even reach the merits of appellant's contention, however, since no objection was interposed to the questions.

Reavis v. United States, 106 F. 2d 982, 984 (10th Cir., 1939);

Brennan v. United States, *supra*;

Sistrunk v. United States, *supra*.

The questions about money taken from defendant at the time of his arrest [R. 228-229] were only further inquiries about matters to which the defendant had already testified on direct examination. [R. 218.]

The questions about defendant's other name [R. 221, 229] were necessarily preparatory to asking him if he had ever been convicted of a felony, in view of the fact that

he was convicted under the name of Louis Friedman and not Louis Fiano.

Appellant also belatedly alleges misconduct by the prosecutor in his arguments to the jury, even though he apparently saw nothing improper at the time such remarks were made, inasmuch as he failed to voice any objections. It is almost a household saying in the Federal Courts that an objection is necessary to preserve alleged error when defendant thinks prejudicial argument is being made, and the Appellate Court will not notice for the first time on appeal alleged errors which could not have seriously prejudiced the rights of appellant.

Gage v. United States, 167 F. 2d 122, 125 (9th Cir., 1948);

Heald v. United States, 175 F. 2d 878 (10th Cir., 1949);

Mitchell v. United States, 208 F. 2d 854, 857 (8th Cir., 1954);

Padron v. United States, 254 F. 2d 574 (5th Cir., 1958);

De Bonis v. United States, 54 F. 2d 3 (6th Cir., 1931).

In *Alberty v. United States*, 91 F. 2d 461, 463 (9th Cir., 1937), this Court stated this well-established rule thusly:

“ . . . Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there should be none in claiming it against the prosecutor. It should be made at once. The court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the court and jury, in an extended trial, and without objection or motion for relief, raise such questions on appeal.”

Perhaps the classic case dealing with this problem is *United States v. Socony-Vacuum Oil Company*, 310 U. S. 150, 237 in which Mr. Justice Douglas in holding that no prejudicial error occurred in the Government's arguments, declared that:

“ . . . counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.” (P. 239.)

Nor should the *alleged* prejudicial remarks be viewed out of context, but rather the argument should be read as a whole. (*United States v. Socony-Vacuum Oil Company*, *supra*, at p. 342.)

Reading the arguments in the instant case in their entirety indicates that none of the remarks quoted in appellant's brief when viewed in their proper context prejudiced the defendant. Many of these remarks were inferences drawn from matters in the record. For example the statement that a person dealing in narcotics would not say over the telephone that he had narcotics to sell, but would more likely tell the purchaser he had someone to meet [R. 236] was proper when the defendant had made substantially the latter statement to Agent Giorgio over the telephone. [R. 74.] The statement that Mr. Giorgio was a bit shaky and raced into the parking lot and parked at an odd angle [R. 266] was proper since Giorgio had testified that he drove in rather hurriedly because he was late and as a consequence parked hurriedly in an odd position across the white lines. [R. 75-76, 111.] The comment on the cost of narcotics [R. 271] was proper in view of the testimony of Giorgio that he gave Fiano \$7,500 for only 17 ounces. [R. 73, 44.] As a matter of fact appellant's counsel also

made the point that this was a huge amount of heroin. [R. 284.]

In like vein, the entire discussion regarding the identity of the person or persons who placed the narcotics in the car contained inferences drawn from the testimony adduced at the trial. [R. 272-274; 75, 77-80.] The closely allied discussions on possession were properly based upon the instructions to be given by the Court. [R. 272.] These instructions were shown to both counsel before argument [R. 164] and later were orally given to the jury. [R. 314.]

The prosecutor's comment that without a sale there "undoubtedly would have been no prosecution," is a sentence taken out of the context of a paragraph which was in answer to appellant's contention that no stealth was shown by Fiano in dealing with Giorgio. [R. 281-284.] In answer to appellant's argument it was in turn argued that stealth could be shown by framing the sale as a point of reference rather than the numerous conversations preceding the sale. [R. 303.] Similarly the comment on why agent Giorgio was willing to wait for the narcotics, was in answer to appellant's argument that it was improbable anyone would wait. [R. 290.] Such so-called retaliatory remarks are proper.

Baker v. United States, 115 F. 2d 533 (8th Cir., 1941) *cert. den.*, 312 U. S. 692;

Ochoa v. United States, 167 F. 2d 341 (9th Cir., 1948);

United States v. Achilli, 234 F. 2d 797 (7th Cir., 1956) *cert. den.*, 352 U. S. 1023, *affd.* 353 U. S. 373;

See *Lawn v. United States*, 355 U. S. 339, 359 (footnote).

The reference to the fact that someone was lying only sought to raise an issue of veracity between the government agents and defense witnesses and is therefore permissible comment.

United States v. Marino, 141 F. 2d 771, 774 (2d Cir., 1944). And counsel for appellant agreed that the credibility of witnesses was completely at issue regarding March 28, 1958. [R. 287.]

“Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, or to make reply to that made by opposing counsel . . . Defendants trial counsel evidently did not regard the argument as vicious or unfair as objection was made to one statement only. . . .”

United States v. Doyle, 234 F. 2d 788, 796 (7th Cir., 1956);

Cf. United States v. Achilli, 234 F. 2d 797, 802 (7th Cir., 1956);

Baker v. United States, 115 F. 2d 533 (5th Cir., 1941), *cert. den.* 312 U. S. 692.

If there is error in any of the comments or questions of the prosecutor, which appellee does not concede, it is not so serious as to be prejudicial in the context of all the evidence in the case. Such evidence was clear and convincing. In such circumstances alleged minor errors should not be noticed as grounds for reversal under Rule 52(b), Federal Rules of Criminal Procedure.

Langford v. United States, 178 F. 2d 48, 54 (9th Cir., 1949);

Gage v. United States, *supra*, at 125.

See also:

Lawn v. United States, *supra*.

F. The Defendant Was Not Prejudiced by the Judge's Refusal to Grant a Continuance of the Trial Date in the Court Below.

After appellant's arraignment on May 19, 1958, he had almost two months to prepare for his trial, which began on July 15, 1958. The charge was contained in a single count indictment and was stated in rather clear terms. The only question presented was whether or not the defendant committed the acts charged. Under such circumstances it was not an abuse of discretion to deny a continuance and proceed with the trial as scheduled.

"The granting of a continuance is not a matter of right, but is always within the sound discretion of the Court. Nor will the Court's exercise of its discretion be disturbed unless it is abused to the prejudice of the complaining party."

Williams v. United States, 203 F. 2d 85, 86 (9th Cir., 1953);

Cf. Sherman v. United States, 241 F. 2d 329, 338; *United States v. Marsek*, 249 F. 2d 941, 943 (7th Cir., 1957);

United States v. Yager, 220 F. 2d 795, 796 (7th Cir., 1955).

It is submitted that in view of the amount of time which elapsed between the appellant's arraignment and the trial date, the Court did not abuse its discretion, if the Court's action is to be equated with an actual denial of appellant's motion. The motion, however, was ordered off calendar because the defendant was not present. Since the defendant was entitled to a speedy trial, the Court was correct in ordering the matter off calendar when the defendant was not present to voice his opinion on the continuance. If

the Court had continued the trial, appellant would now probably assign the Court's action as error because he was not present and was denied a speedy trial.

G. The Trial Court Gave Proper and Adequate Instructions on the Law to the Jury. If the Court Did Err the Appellant Cannot Now Complain Because Appellant Did Not Object to the Instructions as Given, Nor Did He Request Any Instructions.

One of the most basic of rules in the Federal Courts is that whenever any specific instruction is desired by a defendant, such defendant must request that the desired instruction be given by the Court in its charge to the jury. It follows that an assignment of error may not be predicated upon the judge's failure to give such an instruction when the defendant fails to request it.

Goldsby v. United States, 160 U. S. 70, 77;

Himmelfarb v. United States, 175 F. 2d 924, 944
(9th Cir., 1948), *cert. den.*, 338 U. S. 860;

Obery v. United States, 217 F. 2d 860 (D. C. Cir.,
1954).

This Court, in addressing itself to a similar contention, proclaimed emphatically that:

“ . . . under Rule 30 . . . in order to have considered an assignment of error in the failure to give a specific instruction, a request that it be given must first be made to the Court.”

Zamloch v. United States, 193 F. 2d 889 (9th Cir.,
1952);

Cf. Bryson v. United States, 238 F. 2d 657, 664
(9th Cir., 1956);

Pitts v. United States, 237 F. 2d 217 (D. C. Cir.,
1956).

In the instant case not only were no instructions requested by the appellant but also, no objections were made to the instructions as given. Rule 30, Federal Rules of Criminal Procedure, Title 18 has provided that:

“ . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.”

After the Court below had handed counsel for appellant the instructions to be given [R. 164] appellant was specifically asked by the Court on two occasions [R. 230 and 317] if there were any objections and on both occasions counsel stated clearly that there were none. This Court, in considering similar circumstances in *Enriques v. United States*, 188 F. 2d 313, 316 (9th Cir., 1951), said that:

“ . . . Rule 30 is not designed as a mere trap for the unwary. Painsstaking compliance with its requirements, although not an easy matter for the lawyer, is of the very essence of the orderly administration of justice.”

Another Court stated the salutary purpose of Rule 30 thusly:

“ . . . The obvious purpose of this rule is to afford the judge an opportunity to correct erroneous instructions before the jury retires to consider its verdict. . . . ”

Palmer v. United States, 220 F. 2d 861, 867 (10th Cir., 1955).

Needless to say the Court below was not afforded such an opportunity.

Appellant's brief, however, is not devoted merely to negative comments; he offers therein constructive sugges-

tions at this stage of the proceedings as to what the trial judge *should* have included in the charge to the jury. Appellant contends that the omission of such instructions constitutes plain error which should be recognized by this Court under Rule 52(b), Federal Rules of Criminal Procedure. In this he would appear to be wrong for at least two reasons: First, that the instructions he argues should have been given do not apply to the instant case; and secondly, that such instructions as now requested by appellant would have been patently incorrect, even if they could have had some application to the instant case.

For example, appellant contends that the trial judge should have instructed “. . . the jury as to (the) requirement that circumstances be consistent only with theory of guilt and inconsistent with any hypothesis of innocence.” (App. Br. pp. 39 and 40.) The United States Supreme Court disagrees. In *Holland v. United States*, 348 U. S. 121, 139, in which the Court reviewed a net-worth income tax evasion case, Mr. Justice Clark, in considering the trial court’s *refusal* to give the instruction mentioned in appellant’s brief, said:

“The petitioners assail the *refusal* of the trial judge to instruct that where the Government’s evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions . . . but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. *United States v. Austin-Bagley Corporation*, 31 F. 2d 229, 234, *cert. den.* 219 U. S. 863; *United States v. Becker*, 62 F. 2d 1007, 1010; Wigmore, Evidence (3rd Ed.), §§25-26.”

Cf. *United States v. Allard*, 240 F. 2d 841 (3d Cir., 1957).

Appellant also argues that the Trial Court should have instructed more fully on inferences and presumptions, to wit, that the jury should have been instructed "as to the impropriety of basing an inference on an inference or a presumption on a presumption." (App. Br. p. 41.) This Court has considered this pressing issue, and speaking through District Judge James Carter has considered that:

" . . . The old rule laid out in *United States v. Ross* (1875), 92 U. S. 281, 283, that an inference predicated upon an inference is inadmissible has been repudiated . . . (citing cases) . . . The acceptability of the inference drawn turns on whether it has been founded upon 'fact' regardless of whether such fact has been arrived at by direct or circumstantial evidence. . . ."

Toliver v. United States, 224 F. 2d 742, 745 (9th Cir., 1955).

It would also appear that such an instruction would be extremely confusing to any jury and would, perhaps, harm rather than help the cause of justice. In addition, the rule as stated by appellant would appear to be more suited to application by judges when ruling upon the admissibility of evidence, when acting upon motion for judgment of acquittal, or when reviewing cases on appeal. A reading of cases cited by appellant for this outmoded proposition reveals circumstances where the facts upon which inferences were to be drawn were themselves established by inference. This appears to have been just another mode of saying that the evidence was insufficient as a matter of law or that certain evidence was inadmissible because of remoteness.

Even if such a rule were still extant, it is inconceivable that it could be applied to the instant case. Here no

inferences are really necessary to prove the crime charged in the indictment—sale and facilitation of sale of narcotic drugs. The defendant had a number of conversations with Agent Giorgio relating to the purchase and sale of narcotics. [R. 52, 54, 56-60, 70.] On April 2, 1958 Agent Giorgio received \$7,500 in official advance funds which at the defendant's request he transferred to the defendant. [R. 73.] On April 7, 1958 Fiano telephoned Giorgio and told the agent to meet him at Lucy's. Giorgio drove down to Lucy's, was greeted by Fiano who took the agent inside the restaurant. [R. 76.] Appellant then told Giorgio that "his (Fiano's) people" were going to take Giorgio's car for a little while and that the "stuff" would be under the front seat on the driver's side. [R. 77-78.] Fiano then left Giorgio for about fifteen minutes and when he returned informed the agent that Fiano's people had returned the car and that the narcotics would be under the front seat on the driver's side. [R. 79.] Giorgio found the narcotics in the exact place designated by defendant. [R. 80.]

The facts related above might invite speculation as to who placed the narcotics in the car, and one could infer it was the defendant or one could infer it was "his people." But neither inference is necessary to establish the offense charged. The taking of the money, the information the defendant imparted to Giorgio as to the location of the narcotics and the finding of narcotics at that location by Giorgio are enough to find that the defendant made a sale of narcotics, or that he facilitated such a sale.

The preceding skeletal outline of evidence also suggests the possibility that appellant is proceeding on the false assumption that this is "a circumstantial evidence case," so-called. It is at least arguable that the offense was established by direct evidence, to wit: the testimony of

agent Giorgio and his brother officers as to defendant's conversations and actions *and* the finding of the heroin at the exact place defendant said it would be located.

This outline of evidence also unmasks appellant's contention that he had neither actual nor constructive possession of the subject heroin. It clearly shows that Fiano had control over the movement or placement of the narcotic, assuming he never actually held it in his hands.

"A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion or control over a thing, is then in constructive possession of it."

Mathes, *Some Suggested Forms For Use in Criminal Cases*, 20 F. R. D. 267, 278.

The facts of the instant case as applied to this definition illustrate a rather typical example of constructive possession.

Appellant also complains that "(n)o instruction was given here as to appellant's alibi theory of defense." (App. Br. p. 39.) A reading of the record fails to reveal that the appellant ever put on such a defense. The word alibi has been variously defined as follows:

Black's Law Dictionary (4th Ed.):

"ALIBI *Lat.* In criminal law, elsewhere; in another place. . . ."

Webster's New International Dictionary (2d Ed.):

". . . 1. *Law.* The plea of having been, at the alleged time of the commission of the act elsewhere than at the alleged place of commission; also, the fact or state of having been so elsewhere. 2. A plausible excuse; also, any excuse. *Colloq.*"

One of the standard jury instructions used in the Federal Courts charges thusly:

“Evidence has been introduced tending to establish what we call an alibi—that the defendant was not present at the time when and the place where he is alleged to have committed the offense charged in the indictment. . . .”

Hon. William C. Mathes, *Some Suggested Forms For Use In Criminal Cases*, 20 F. R. D. 231, 256; *Cf. Colbeck v. United States*, 10 F. 2d 401, 403 (7th Cir., 1925);

Tomlinson v. United States, 93 F. 2d 652, 655 (D. C. Cir., 1937).

In the trial of this case in the Court below, the defendant not only did not deny that he was present at the time and place where the alleged offense occurred, but on the contrary, testified that he was present at such times and places, though he denied any acts consistent with the commission of the instant offense. Thus, after Agent Giorgio had testified that he received a call from the appellant on April 2, 1958 at approximately 12:30 p.m. [R. 70], and then met Fiano at Lucy's Restaurant where he gave Fiano \$7,500 for the narcotics [R. 70-73], the defendant testified that he saw Agent Giorgio at Lucy's on April 2, 1958 at 2:00 p.m., but did not receive any money from the agent. [R. 207-209.] The appellant never claimed to be at any other place when the money was exchanged, nor did he produce any witness to testify to that effect. On the date on which the indictment alleges that the sale of heroin occurred, April 7, 1958, the prosecution and the defense were in rapt agreement. Agent Giorgio testified that on April 7, 1958 he received a call from Fiano about 9:50 a.m. and immediately drove to

Lucy's where he met the defendant at approximately 10:30 a.m. [R. 74-79.] When the defendant took the witness stand he testified that he had a conversation with Agent Giorgio at Lucy's in the forenoon on April 7, 1958 [R. 154-155]. In response to Agent Jones' testimony which placed Fiano in the parking lot at Lucy's on the morning of April 7, 1958 [R. 154-155], the defendant offered the explanation that he was in the parking lot at Lucy's in the morning fixing some water cooler pumps and looking for a person he called his "colored boy." [R. 212.] It was on this date that the narcotics were placed in Giorgio's car while it was parked in Lucy's lot. [R. 80, 154.]

An alibi instruction would therefore have been improper.

Assuming, *arguendo*, that an alibi was established, the defendant should have requested such an instruction and may not now assign error in the Court's failure to do so on its own motion because:

“. . . except in cases where the sensitive defense of insanity is involved . . . (*Tatum v. United States*, 190 F. 2d 612) . . . , or where the trial situation has been one of such complexity or confusion as to persuade of probability that, without some statement by the Court, the jury will not be able intelligently to comprehend or keep in mind the significant evidential questions involved . . . , the defendant in a criminal case will not ordinarily be heard to complain of the trial court's failure to set out in its charge his specific theory or theories of defense, unless he has himself formulated them into a proper and tendered instruction.”

Apel v. United States, 247 F. 2d 277, 282 (10th Cir., 1957).

In addition the California courts have held that alibi is not a general principle of law and therefore the court

need not give such instruction on its own motion even though substantial evidence thereon is in the record.

People v. Whitson, 154 P. 2d 867 (Cal., 1945),
cert. den. 325 U. S. 874;

Cf. People v. Williams, 314 P. 2d 161, 164.

H. The Evidence Presented by the Government Is Sufficient to Sustain Appellant's Conviction.

It is invariably held in the Federal Courts that upon appeal from a conviction, the evidence and all inferences which may reasonably be drawn therefrom are to be viewed in the light most favorable to the government.

United States v. Glasser, 315 U. S. 60, 80;

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937;

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227 (9th Cir., 1955), *cert. den.*, 350 U. S. 954.

Viewing the evidence in this light

“ . . . (t)he verdict of the jury must be sustained if there is substantial evidence. . . . ”

Woodard Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952).

And the Court in the *Woodard* case defined substantial evidence as

“ . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (*Supra*, at p. 998.)

With these rules in mind, a review of the record leads almost inescapably to the conclusion that there was sub-

stantial, and perhaps conclusive, evidence upon which the jury could have based a verdict of guilty. The appellant entered into a series of negotiations with Federal Narcotics Agent Stephen Giorgio, who the appellant knew as Louis Di Stephano, after meeting Giorgio at Lucy's Restaurant in mid-March of 1958. [R. 48.] At this time appellant Fiano knew the agent only as a customer at the restaurant. After Giorgio had visited the restaurant a number of times, he and Fiano had a conversation about the woman's wrist-watch on March 26, 1958, and it was at this time that Fiano and the agent first discussed narcotics. [R. 52.] After this initial conversation about narcotics, the defendant carefully checked Giorgio's background before he accepted \$7,500 for the purchase of 17 ounces of heroin. [R. 56, 57, 62, 63, 66 and 73.] On the morning of April 7, 1958 when the narcotics were placed in Giorgio's automobile, the defendant continued to be wary of dealing with Giorgio when he said,

“ . . . ‘Lou’ . . . ‘I still don't know you’
 . . . ‘but I am going through with this thing.’ ”

[R. 77];

and when he was perhaps testing the agent's knowledge of the narcotics trade in the following colloquy related by Agent Giorgio:

“He wanted to know with what I cut the narcotics. . . .

“He asked me was I going to sell it pure or cut it, so I said I would cut it. . . .” [R. 78.]

“He asked me what I was going to use, and I told him quinine, milk sugar, mannite. He threw his hands in the air and said, ‘Naw, Naw! Just use milk sugar.’ . . .” [R. 79.]

Prior to the time that Giorgio found the heroin in his automobile on April 7, 1958, appellant told the agent that "his (Fiano's) people" were going to take Giorgio's car, which was parked at Lucy's Restaurant [R. 77] and further informed the officer that "the stuff will be under the front seat on the driver's side." [R. 78.] Fiano then left the agent for approximately fifteen minutes [R. 78] during which time he was observed by Agent Jones to emerge from the restaurant and enter Lucy's parking lot [R. 154] and approach the area in which Giorgio's car was parked [R. 163], after which he looked over the surrounding area very carefully and then reentered the restaurant. [R. 154.] After entering the restaurant Fiano engaged in the conversation about cutting heroin (*supra*), and then told Giorgio that Fiano's people had brought the agent's car back and that the narcotics would be under the front seat on the driver's side. [R. 79.] Agent Giorgio walked out of the restaurant with Fiano and then drove off alone [R. 80], while the defendant remained in the parking lot scanning the general area. [R. 155.] When Agent Giorgio reached his apartment he found a package under the seat of his car on the driver's side [R. 80] in the exact place the defendant said it would be. This is surely not a coincidence.

It is submitted that the proven facts related above present substantial evidence upon which a jury of reasonable persons could have based a verdict of guilty. The only question presented was one of credibility. The jury obviously chose to believe Agent Giorgio and his brother officers and to disbelieve the defendant and his witnesses. When questions of credibility are involved, appellate courts will not disturb the verdict of the jury, since it is not

the function of appellate courts to weigh evidence or determine credibility of witnesses.

Woodard Laboratories v. United States, supra;
Sandez v. United States, 239 F. 2d 239, 243 (9th Cir., 1956);
Penosi v. United States, 206 F. 2d 529 (9th Cir., 1952).

With regard to appellant's analysis of the number of inferences to be made, this appears to be unwarranted in light of appellant's statement to Giorgio that the narcotics would be under the front seat of the car, and in view of this circuits repudiation of the archaic doctrine that an inference cannot be based upon another inference.

See *Toliver v. United States*, 224 F. 2d 742, 745 (9th Cir., 1955).

See also discussion under *Point G, supra*.

This evidence would seem to raise very few doubts, but even if a few possible doubts remain,

“(t)he proof in a criminal case need not exclude all *possible* doubt. It ‘need go no further than reach that degree of probability where the general experience of men suggest that it has passed the mark of reasonable doubt.’”

Norwitt v. United States, 195 F. 2d 127, 134 (9th Cir., 1952), *cert. den.*, 344 U. S. 817.

Panci v. United States, 256 F. 2d 308 (5th Cir., 1958), upon which appellant relies so heavily is easily distinguishable on its facts. In that case, hearsay statements were admitted over objection to connect the defendant with a conspiracy when the conspiracy had not been established by independent evidence. There were no statements of the defendant which connected him with the conspiracy.

The evidence only showed that an agent had given \$1,050 to co-defendant Giardina. The latter went to his house and procured one ounce of heroin from a brown bag. Prior to this there was testimony that Panci and Giardina were seen together and Panci was seen giving a brown bag to Giardina. The bag was never identified as the one given by defendant to Giardina nor could anyone testify that the bag had narcotics in it when Panci gave it to Giardina. In the instant case the defendant told Agent Giorgio where the narcotics were to be retrieved; Agent Giorgio found them in the place indicated by appellant; and Agents Giorgio and Garberson testified to making a field test which showed that the substance Fiano sold to Giorgio was heroin. [R. 82-83, 121.] Needless to say the instant case was not a conspiracy and there was no hearsay introduced over objection tending to connect defendant with such conspiracy. In the instant case the statements of the defendant plainly indicated where the heroin was placed for delivery to the agent. There was no such evidence in *Panci*.

It is submitted that the evidence presented in the entire record is sufficient to support a verdict of guilt.

I. The Sentence Imposed Upon Appellant Was Not Excessive.

Appellant's argument that on a first offense the maximum is unwarranted seems to fly in the face of the statute under which appellant was sentenced since that statute makes a distinction between first and subsequent offenders and prescribes more substantial penalties for subsequent offenders.

21 U. S. C., Sec. 174.

The penalty imposed in this case was within the legal limits of the statute and is hardly excessive in view of the large amount of pure heroin involved. [R. 44-45.]

J. The Court Did Not Err in Denying Appellant's Motions for Judgment of Acquittal and a New Trial.

Prefatorily it should be pointed out that appellant may not now urge as error the Trial Court's denial of motions for judgment of acquittal and a new trial upon all of the grounds appellant alleges in his brief, since all of those grounds were not urged in the Court below in support of such motions. [R. 14-15.]

With regard to the sufficiency of the evidence, however, the evidence adduced by the prosecution (see *Point H, supra*) presented facts upon which the jury could have based a verdict of guilty.

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953).

When the evidence is in this state

“ . . . the case must be submitted to the jury, and their decision is final.”

Schino v. United States, supra.

The instant case, under the above test, was properly submitted to the jury.

The only other point legitimately preserved by appellant's motions made at the conclusion of the trial concerned the disqualification of defense witness Blackburn who sought to introduce an alleged hotel record. For the reasons stated in *Point A* of this brief, there was no reversible error committed by the Court in this regard.

V.

Conclusion.

From the rules and arguments set forth above, it is concluded that the trial court committed no error in the trial of the appellant. In the event that it is considered by this court that the trial court committed error, it is urged that the error was harmless.

Respectfully submitted,

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No. 16177 ✓

United States
Court of Appeals
for the Ninth Circuit

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED
NOV 21 1958
PAUL P. O'BRIEN; CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 57876

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency Ap:LA:AA:KD-Ht 90D:CSW, dated March 9, 1955, and as a basis of their proceeding allege as follows:

1. The petitioners reside at 400 South Burnside Avenue, Los Angeles 36, California. The return for the period here involved was filed with the District Director of Internal Revenue, Los Angeles, California.

2. The Notice of Deficiency, a copy of which is attached and marked "Exhibit A" was mailed to the petitioners on March 9, 1955.

3. The deficiencies as determined by the Commissioner are in income taxes which were due for the taxable year ended December 31, 1952, in the amount of \$7,705.78, of which the full amount of \$7,705.78 is in dispute.

4. The determination of tax set forth in the said

Notice of Deficiency is based upon the following errors:

(a) It was error for the Commissioner to reduce the business expenses listed under Paragraph D, page 2, of the Statement of Deficiency (Exhibit A) from \$19,147.62 to \$4,916.62. The various items which were reduced by the Commissioner are as follows:

Club dues claimed: \$2,154.00.

Allowed: \$1,008.00.

Business promotion expense and maintenance expense of 138 North June Street, where petitioners resided and which premises were used also by petitioner Lyndol L. Young for office and business purposes:

Amount claimed: \$5,843.62.

Also originally included in said item was the sum of \$3,650.00 representing cash expended by petitioner Lyndol L. Young for business purposes.

Total: \$9,493.62.

Amount allowed by Commissioner: \$750.00.

Travel expenses originally claimed: \$3,500.00.

Allowed by Commissioner: \$2,158.62.

Depreciation of Cadillac car claimed: \$4,000.00.

Allowed by Commissioner: \$1,000.00.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) As indicated in the Statement of Deficiency (Exhibit A) sub-paragraphs (a), (b), (c), (e), (f), (g), (h) and (i) have been agreed to by the Commissioner and petitioners. The items in dispute in

this proceeding are those which are listed under Paragraph D, page 2, of the Statement of Deficiency (Exhibit A) amounting to the sum of \$14,231.00.

(b) Club dues disallowed in the sum of \$1,146.00 is not supported by the record or the facts which were submitted to the representatives of the Commissioner. Although only the sum of \$1,008.00 is allowed to cover club expense (Exhibit A) the sum of \$1,581.62 was approved by the representatives of the Appellate Division as shown in petitioner's letter dated December 9, 1954, copy of which letter is attached hereto and marked "Exhibit B." The amount claimed by petitioners includes expenses incurred by petitioner Lyndol L. Young at the following clubs: Los Angeles Stock Exchange, Los Angeles Country Club and the Beach Club. Petitioner Lyndol L. Young has been a member of said clubs for many years and has received from clients through the use of the facilities of said clubs substantial fees over a period of years in a sum in excess of \$100,000.00.

(c) The item which is listed business promotion expense (Exhibit A) where petitioners claim \$9,493.62 in their return and which is allowed by the Commissioner in the sum of \$750.00 consists of the following breakdown:

The sum of \$5,843.62 for part of the maintenance and operation of the premises known as 138 North June Street, Los Angeles, California, used by petitioners as a home and by petitioner Lyndol

L. Young in part as his office. This item of expense was approved in approximately the same amount by the Director of Internal Revenue as recently as April 1953, in accepting the report of revenue agent Theo Schultz covering the income tax returns of the taxpayers for the years 1948, 1949 and 1950. Petitioners paid the deficiency found due by Agent Schultz in said report and now claim that this item of expense covering the premises at 138 North June Street has been approved in principle in the previous tax years above mentioned and that petitioners are entitled to make the same deduction in connection with said premises for the year 1952. The other item of expense making up the total of \$9,493.62 consisted originally of cash expended for business purposes by petitioner Lyndol L. Young in the sum of \$3,650.00. This item was later reduced by petitioners in conference with the representatives of the Appellate Division to the Sum of \$3,150.00. Although the Statement of Deficiency (Exhibit A) shows only an allowance of \$750.00 of this total expense of \$9,493.62 the representatives of the Appellate Division in conference with petitioner Lyndol L. Young approved the allowance of \$1,076.00 on the item of \$5,843.62, and further approved the allowance of the sum of \$2,000.00 on the item of \$3,150.00 (Exhibit B).

(d) Travel expense originally claimed, \$3,500.00; Amount allowed, \$2,158.62.

Both in petitioner's protest as well as in the conference with the representatives of the Appellate Division petitioner Lyndol L. Young stated that the

sum of \$7,506.68 and not the sum of \$3,500.00 as reported was incurred by petitioner Lyndol L. Young as travel expense and that in view of the allowance of only \$2,158.62 for this item, the amount claimed by petitioners is the full amount of \$7,506.68, less not more than 30% thereof to cover the expenses of Mrs. Young on the trips where she accompanied petitioner Lyndol L. Young.

(e) Depreciation of Cadillac car claimed, \$4,000.00; Allowed, \$1,000.00.

This car was purchased in December 1948 and through oversight and inadvertance on the part of the Accountant for petitioner Lyndol L. Young depreciation was not claimed for the years 1949, 1950 and 1951 in the sum of \$1,000.00 for each of said years. This automobile cost \$5,200.00. Because of this oversight depreciation for said years 1949, 1950 and 1951 was included in the petitioners' income tax returns for the year 1952. Petitioners contend that inasmuch as the failure to take said depreciation was not because of any willful or intentional motive on the part of the petitioners but solely through inadvertence of said Accountant that they were entitled to claim the sum of \$3,000.00 for the said years 1949, 1950 and 1951 in their return for the year 1952.

6. As disclosed by the income tax return and the Statement of Deficiency the gross income received by petitioner Lyndol L. Young from his law practice during the year 1952 was approximately \$62,-

000.00. No other income was received by either of the Petitioners from any other source for the year 1952. Petitioners therefore respectfully contend that the business expenses claimed by petitioners in connection with the maintenance of the law practice of petitioner Lyndol L. Young in the total amount of \$19,147.62 is reasonable, fair and just under the Cohan Rule when considered in their relationship to the income received by petitioner Lyndol L. Young from his law practice. Taxpayers therefore respectfully claim that there has been an overpayment for their tax liability for the year 1952 and that no deficiency should be assessed in any amount, but that the amount overpaid should be refunded to taxpayers, together with interest.

Wherefore, the petitioners pray this Court may hear the proceeding and redetermine that no deficiency exists in the income tax of the petitioners for the year 1952.

LYNDOL L. YOUNG,
/s/ LYNDOL L. YOUNG,
Counsel for Petitioner

Duly Verified.

EXHIBIT "A"

Form 1230 (App.)

U. S. Treasury Department, Internal Revenue
Service, Regional Commissioner

In Reply Refer To

Mar. 9, 1955

Ap:LA:AA:KD-HT

90D:CSW

Mr. Lyndol L. Young and Mrs. Mildred W. Young
(Husband and Wife)

138 North June Street, Los Angeles 4, California

Dear Mr. and Mrs. Young:

You are advised that the determination of your income tax liability for the taxable year (x) ended December 31, 1952, discloses a deficiency or deficiencies of \$7,705.78, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Bldg., Los Angeles 13, Calif. The signing and filing of this form will expedite the closing of your return(x) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

/s/ By H. I. DUCKER,
Associate Chief, Appellate Division

Enclosures: Statement, Form 1276, Agreement Form.

Statement

Ap:LA:AA:KD:Ht
90D:CSW

Mr. Lyndol L. Young and Mrs. Mildred W. Young, 138 North June Street, Los Angeles 4, California

Tax Liability for the Taxable Year Ended December 31, 1952.
1952—Deficiency: \$7,705.78.

In making this determination of your income tax liability, careful consideration has been given to the report of examination, a copy of which was forwarded to you on August 24, 1954, to your protest dated September 21, 1954, and to the statements made at conferences held on October 20, November 15, and December 8, 1954.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return				\$24,575.16
Additional income and unallowable deductions:				
(a) Clerical error	\$	200.00		
(b) Unreported income		1,150.00		
(c) Automobile expense		367.69		
(d) Business expenses		14,231.00		
(e) Accident and health premiums		169.27	\$16,117.96	
<hr/>				
Additional deductions:				
(f) Subscriptions	\$	14.56		
(g) Legal and Accounting		50.00		
(h) Office supplies		200.17		
(i) Postage		2.00	\$ 266.73	15,851.23
<hr/>				
Net income as adjusted.....				\$40,426.39

EXPLANATION OF ADJUSTMENTS

(a), (b), (c), (e), (f), (g), (h) and (i). These adjustments have been previously agreed to by you.

(d) It has been determined that you have overstated your allowable business expenses to the extent of the amount disallowed in accordance with the following adjustments:

	Claimed	Allowed	Disallowed
Club dues	\$ 2,154.00	\$1,008.00	\$ 1,146.00
Business promotion expense	9,493.62	750.00	8,743.62
Travel expenses	3,500.00	2,158.62	1,341.38
Depreciation on Cadillac car....	4,000.00	1,000.00	3,000.00
<hr/>			
Total.....	\$19,147.62	\$4,916.62	\$14,231.00

COMPUTATION OF TAX

Net income as adjusted	\$ 40,426.39
Less: Exemptions (2)	1,200.00
<hr/>	
Amount subject to tax	\$ 39,226.39
Joint return (one-half)	\$ 19,613.20
Tax on \$19,613.20	\$ 7,887.79
Joint return (multiplied by 2)	\$ 15,775.58

Correct income tax liability	\$ 15,775.58
Assessed:	
Original, Acct. No. 263025840	\$7,330.00
Additional, Feb. 1955 List,	
Acct. No. 2-510002	739.80 \$ 8,069.80
	<hr/>
Deficiency of income tax	\$ 7,705.78

EXHIBIT "B"

Lyndol L. Young, Attorney at Law, Suite 845 Gen-
eral Petroleum Building, Los Angeles 17

(Copy) December 9, 1954

Internal Revenue Service
Appellate Division
Subway Terminal Building
Los Angeles, California

Attention: Messrs. Wulke and Graham

Dear Sirs:

At your request I attended a conference in your office yesterday, and you made the following proposal to me in connection with the adjustment of my 1952 tax return:

The increase of my income by the sum of \$1,-350.00 is correct.

You propose to allow me \$1,132.00 for my automobile expense. I claimed \$1,500.00, and \$500.00 was allowed by the agent.

The telephone expense of \$835.00 is approved by you.

My club expense, which is claimed in the sum of \$2,154.00, is approved by you in the sum of \$1,581.00.

My travel expense, which I claimed in the sum

of \$3,500.00, is approved by you in the sum of \$2,138.62.

Depreciation on my 1949 Cadillac Automobile was claimed by me in the sum of \$4,000.00, and you approved this item for the sum of \$1,000.00.

Business production and entertainment expenses claimed by me in the sum of \$5,843.63 is reduced by you to the sum of \$1,076.00.

Cash disbursements made by me in connection with business expense in the sum of \$3,150.00 is approved by you for the sum of \$2,000.00.

You are advised that I accept your conclusions on the following items: Automobile expense and telephone expense.

I decline to accept your proposals on all of the other items.

My total travel expense for the year 1952 was the sum of \$7,506.68. In my return I thought it was more than fair to the Government to claim only \$3,500.00, as Mrs. Young accompanied me on some of the business trips that I made in 1952. However, since a disagreement has arisen with reference to the claim of \$3,500.00 you are advised that in my opinion at least 70% of the total sum of \$7,506.68 should be charged to business expense and that only 30% of said amount is chargeable to having Mrs. Young accompany me.

On the item of \$5,443.63 chargeable to entertainment and business production and cost of operation of premises at 138 No. June Street you are advised that your reduction of this amount to the

sum of \$1,076.00 is arbitrary and without justification in view of the prior approval of this item of expense by the Internal Revenue Department, as stated in my protest and request for hearing. This same expense for the year 1948 when my income was approximately \$35,000.00 was approved for the sum of \$5,456.73, and in the year 1949 when my income was approximately \$40,000.00 this identical expense was approved in the sum of \$4,757.76, and in the year 1950 when my income was approximately \$39,650.00 this identical expense was approved for \$4,998.70. Your reduction, therefore, of the amount claimed in 1952, which is in line with the amount approved in prior years, is without justification and is wholly illogical and unreasonable.

I settled the claimed deficiencies in the years 1948, 1949 and 1950 on the approval by the Department of Internal Revenue of my right to deduct this item of expense as a business expense and the Government is not in a position at this time to repudiate its agreement with me which recognized and approved this expense. Your reduction of this item to the sum of \$1,076.00, when considered in relationship to my income of approximately \$62,000.00 for the year 1952, is unreasonable and without support in law or logic.

To tell me as a lawyer, who received an income of \$62,000.00 in 1952 for my professional services, that I am only entitled to less than 2% of this amount to cover business production and entertain-

ment expense is wholly unreasonable. Even in the Sandrich case, relied on by you, where the same item was \$3,233.91, the Government allowed \$2,250.00. In my opinion this case has no analogy whatsoever to my situation. Sandrich was a paid employee of a Motion Picture company whereas my income is received from an entirely different source, to-wit, my clients, and I think it is for me to say how much money is reasonable for me to charge for the entertainment of my clients and for the purpose of handling their affairs. Certainly the modest sum claimed by me on this item, when considered in its relationship to my income of approximately \$62,000.00 is exceedingly reasonable.

I claimed \$3,150.00 for business expenses paid by me in cash. You propose to reduce this amount to \$2,000.00 upon the basis of allowing me \$10.00 per day for 200 days a year as business days. Whatever may be the schedule followed by other people with reference to working five days a week, I assure you that the business days in my calendar year are 365.

Sincerely,

Lyndol L. Young

LLY-np

Served May 20, 1955.

[Endorsed]: T.C.U.S. Filed May 19, 1955.

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and subparagraph (a) thereunder.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (e), inclusive. Denies the allegations contained in subparagraphs (b) to (e), inclusive, of paragraph 5 of the petition.

6. Denies the allegations contained in *paragraph of* the petition.

7. Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

Melvin L. Sears, Regional Counsel; E. C. Crouter, Assistant Regional Counsel; R. E. Maiden, Jr., Special Assistant to the Regional Counsel; Arthur Clark, Jr., Attorney; Internal Revenue Service.

[Endorsed]: Filed June 28, 1955.

The Tax Court of the United States

Docket No. 58876

In the Matter of:

LYNDOL L. YOUNG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Courtroom of the United States Tax Court, Federal Building, Dept. 9, Los Angeles, California, Wednesday, June 5, 1957, 11:00 a.m.

The above-entitled matter came on for hearing, pursuant to notice, at 11:00 o'clock a.m.

Before: The Honorable John E. Mulroney.

Appearances: Francis J. McEntee, 839 General Petroleum Building, Los Angeles 17, California, on behalf of the Petitioner. Gene F. Reardon, 1135

Subway Terminal Building, Los Angeles 13, California, on behalf of the Respondent. [1*]

Proceedings

The Clerk: Docket No. 58876, Lyndol L. Young. State your appearances, please.

Mr. McEntee: Francis J. McEntee for the Petitioner.

Mr. Reardon: Gene F. Reardon for the Respondent.

The Court: Do you have an opening statement, Mr. McEntee?

Mr. McEntee: This involved an income tax for the year 1952 involving Lyndol L. Young, and his wife, Mildred W. Young.

The main issues go to certain business expenses regarding the use of his home for business purposes, the use of his club for business purposes, and certain trips made for business purposes.

Mr. Young is an attorney and has been engaged in the practice of law here in Los Angeles for many years, and he has wide experience in investments, brokerage business, and general financial experience.

He is also an eminent trial attorney, and has prepared some statements of fact relating to these issues which may save the Court time, and I can call him briefly, but primarily whether certain expenses were reasonable with reference to the income of that year, which was \$62,000.00, and busi-

* Page numbers appearing at top of page of Reporter's Transcript of Record.

ness expenses relating to the 138 North June Street address claimed in the amount of \$5,843.63. In addition, there were certain cash disbursements in the amount of \$3,150.00, making a total of \$9,493.62, on which there was a disallowance of \$8,743.62; Mr. Young will give evidence on that.

His club expenses claimed in the return, 1954 tax return, \$2,154.00, of which was allowed \$1,008.00, representing a disallowance of \$1,146.00.

The travel expense claimed was \$3,500.00, which the proposal allowed \$2,158.62, representing a disallowance of \$1,341.38.

I think that summarizes the issue.

Mr. Reardon: The deficiency, your Honor, is in the amount of \$38,295.24, and my understanding is that there are additional issues involved in the depreciation on the Cadillac that have never been resolved. I would like to summarize that; I have that here.

The figures on the travelling expenses disallowed of \$1,341.38.

Mr. McEntee: May I add the depreciation on the Cadillac claim is \$4,000.00, of which \$1,000.00 was allowed and \$3,000.00 was disallowed.

Mr. Reardon: At this time, your Honor, I think it would be proper to offer joint Exhibit 1-A, which is the Petitioner's tax return for the year involved; this is a photostat.

The Court: Is there any stipulation of any of the [4] facts?

Mr. Reardon: No, your Honor.

The Clerk: 1-A.

(Joint Exhibit No. 1-A was marked for identification and received in evidence.)

[See pages 59-62.]

Whereupon

LYNDOL L. YOUNG

was called as a witness on behalf of the Petitioner, and having been first duly sworn, testified as follows:

The Clerk: State your name and address.

The Witness: Lyndol L. Young, 400 South Burnside Avenue, Los Angeles 36.

Direct Examination

Q. (By Mr. McEntee): Mr. Young, you are one of the Petitioners in this case? A. Yes.

Q. And your wife, Mildred Young, is the other Petitioner? A. Yes.

Q. And you did file a tax return for 1952 which has been introduced into evidence? Have you signed this?

A. Yes, I have seen the photostatic copy which you have in your hand, and counsel also showed us the original copy this morning, and the exhibit as introduced is the income tax return filed by Mrs. Young and myself. [5]

Q. And you paid the amount of the tax indicated? A. Yes.

Q. Now, Mr. Young, you are a practicing attorney in Los Angeles? A. Yes, sir.

Q. And when were you admitted to the bar?

A. I was admitted to the California Bar in November, 1916. I was admitted to the Bar of the United States Supreme Court in 1921, May, 1921.

(Testimony of Lyndol L. Young.)

Q. And you have maintained an office in downtown Los Angeles?

A. Well, I have intermittently since the time of my admission both in the California Bar and to the Supreme Court of the United States, the Federal Court, but not continuously, no.

Q. Have you made a business use of your home?

A. Yes.

Let me first answer your question with reference to maintaining my office.

Your Honor, when I was admitted to the Bar in 1916, my father was a lawyer and had been a practicing attorney for many years, and I made my office in his office.

In 1918, I was appointed Assistant U. S. Attorney for the Southern District of California, and served in that capacity at the old courthouse that stood on this very site [6] until 1919, a period of about a year and a half, and then I was appointed by the Attorney General of the United States as Special Assistant United States Attorney here to represent the Government in several appeals that had been taken in cases that I prosecuted during the time I was in the office.

I opened my office with my father in 1920, and remained in active law practice in this city with him until 1928. At that time I went into the investment banking business and brokerage business of this city, a company called Lyndol Young and Company, Members of the Los Angeles Stock Exchange, and remained in that business until 1930.

(Testimony of Lyndol L. Young.)

Then the business was closed for the reason of economic conditions of the country at that time, the crash of 1929, for the lack of business to make the operation profitable.

I then, in 1931—no, 1930, after leaving the brokerage business, I represented Mr. E. L. Cord in connection with a number of his local investments in Los Angeles, including the Century Airlines and a broadcasting company which operated two radio stations; also in connection with a building which he constructed at Mariposa and Wilshire Boulevard, and other matters. In 1931, December, I went to Washington, D. C., representing the Century Airlines, in an effort to obtain mail contracts for that company. That company operated from Los Angeles to San Francisco, Sacramento and Portland in the north, and from Los Angeles to Yuma, Phoenix, Tucson and El Paso in [7] the eastern direction.

While I was in Washington, along in March of 1932, I effected a sale of the Century Airlines to the Aviation Corporation. Mr. Harriman now Governor of New York, was Chairman of the Board, and Mr. Robert Lehman was President. Upon that sale being effected, I was made a Director of the Aviation Corporation and went to New York and was in New York in 1932, 1933 and part of 1934. I subsequently became Vice President of the Aviation Corporation, and Director of the American Airways, which is now American Airlines.

I returned to California in 1934, and didn't un-

(Testimony of Lyndol L. Young.)

dertake to resume my law practice until about 1935, at which time I again went into the office with my father, and from 1935 down to the present time, I have been engaged actively in the practice of law.

Q. Can you tell us some of the fees that have been earned in connection with the use of your home?

A. When I returned to California in 1934, and resumed my law practice, as I stated, I opened an office. I didn't open an office for sometime. This house, which was involved in this matter, was a business deduction claimed, was purchased by me in 1927, but as I have related, I left the law practice in 1928 and didn't return until 1935, or 1936. The house has been used in connection with my law practice as an office from 1936 to the present time, because I sold the house in 1955, [8] disposed of the house; bought it for \$20,000.00, and sold it for \$40,000.00, with a commission of 5%.

When I returned from New York, two clients which had been my clients when I was practicing law in Los Angeles, were unfortunately for themselves, but fortunately for their attorney, in legal difficulty. They were Mrs. Katherine Iten and her daughter Mrs. Tierney. They had been my clients from the early twenties.

Mrs. Tierney was involved in domestic difficulty with her husband, and she was at that time seriously ill with tuberculosis.

I instituted, on her behalf, in 1936, a divorce

(Testimony of Lyndol L. Young.)

action against her husband, and she was granted a decree of divorce after a trial, and in 1938 she died.

Because of her physical condition, all of our conferences and meetings and discussions in connection with her domestic difficulties took place either at my home at 138 North June Street, or when she was too ill to come to my home, I went to hers.

Q. Did she ever come to your office?

A. No, Mrs. Tierney never came to my office in connection with any matter I handled for her.

After Mrs. Tierney passed away in 1938, I was named in her will as Co-Executor and Co-Trustee of her will, and her mother, Mrs. Iten, was also Co-Executor and Co-Trustee. I probated the will. She left a large estate, approximately [9] \$900,000.00; she left two children—small children, at that time, ages 5 and 8. I also was named as guardian of the two minor children, along with their grandmother.

I continued to look after that estate continuously, and the two minor children, as their guardian, up until the time when they became of age, one becoming of age in 1950, and the other in 1953.

Q. Did the children come to your home?

A. Yes, the children came to my home, and I purchased, as their guardian, a home within a block from where I resided at 138 North June Street. Our house was constantly visited by the children, who would come there, and the lady that

(Testimony of Lyndol L. Young.)

came with them, in 1940. Many, many problems would come up regarding the children, and she would come and discuss matters with me, and I also would go there.

Q. Approximately what fees did you receive from Mrs. Tierney or her Estate?

A. From both Mrs. Tierney and her Estate I received, from 1936 down to the present time, approximately \$232,000.00.

Q. What did you receive from Mrs. Iten?

A. \$150,000.00.

I might state that Mrs. Iten never came to my office in connection with any of the problems, legal problems, that I handled for her over the period of years that I represented her; she passed away in 1943, and I became Executor under her will, and Trustee of her Estate, and also at that time became [10] the surviving Trustee of her daughter's Estate.

Q. You were still rendering service in the tax year for the Estate of Mrs. Iten, on which you received a substantial fee of \$17,676.00; is that correct?

A. Yes.

Q. And the Tierney Estate, you received in 1952 the sum of \$12,000.00?

A. Yes.

Q. I have noticed on this statement the Filor sisters paid you \$15,000.00. In 1952 the Liberty Mutual Insurance Company, in 1952, the fee was \$5,200.00, and the Hiller fee was \$2,500.00.

Mr. Hiller was your client, and his wife sued

(Testimony of Lyndol L. Young.)

him for divorce, and you were associated with me in that particular matter?

A. Yes, sir.

The Filor sisters, their married names are Mrs. M. L. Day, and Mrs. Gertrude Lytten Smith. The services rendered are stated very much in detail in a decision which has recently come down by Judge Laine over in Phoenix, Arizona, involving my services.

"J. Lytten Smith, the Claimant, vs. the United States of America, Defendant. U. S. District Court of Arizona, Civil Action No. 2236, the date of the opinion is 1-5-36."

The services rendered in that matter consisted of the settlement of their interest in their brother's estate in [11] Arizona; their brother, James Filor, was killed in an airplane accident in 1951, August of 1951, and his wife and two children who were with him were likewise killed in the same accident.

These two, Mrs. Day and Mrs. Lytten Smith, were his sisters. He left in Arizona a large ranch, a cattle ranch, and with a number of cattle, I think approximately 2500, 3,000 head of cattle.

Upon his death, the mother-in-law, the mother of his wife, claimed that the property was community property, and that half of it should go to her. These clients of mine lived in Arizona. I had no conversation or meeting with them in connection with this matter in Los Angeles, either in my office, or in my home, except over the telephone. However, both of them were in my home with their

(Testimony of Lyndol L. Young.)

husbands, they were nieces of J. A. Thompson, a client of mine for many years, they were in my home on several occasions during the past years. These services were rendered through the year 1951, practically concluded in 1951, and as a result of the services they made a settlement with the mother-in-law which was financed by the Valley National Bank of Phoenix, Arizona; and then they were paid approximately \$400,000.00 in cash, and the mother-in-law assumed, along with the bank, as administrators of the estate, the payment of all of the taxes.

In addition to that, they received a trust fund in New York which was for the benefit of their brother for about [12] \$60,000.00. I rendered a bill for \$25,000.00, which was paid, and this proceeding I referred to, your Honor, which involved that payment of \$25,000.00 was a deductible item by them, both the sisters, and that's—

Q. You did render service, however, at your home and at the club?

A. There was limited office service.

The Court: Was the category of expense that has to do with travel, is it a category that has to do with home?

Mr. Reardon: It goes to the home and club.

Q. (By Mr. McEntee): Will you describe the activities of your method regarding the use of your home and the Los Angeles Country Club?

A. Well, my home and my club, the Los Angeles Country Club, have been used by me for many

(Testimony of Lyndol L. Young.)

years more than my downtown office; actually been a second office for me.

I don't make any claim that either the home or the club expenses are for entertainment—some of the items were used for entertaining clients when they came to see me where I worked in my home in connection with their matters.

Q. What was your relation with the Liberty Mutual Insurance Company? Did you use your home and your club in connection with that account?

A. Yes, I used my home. I have been an attorney for the Liberty Mutual Insurance Company since 1936, and during that [13] period of time I have been paid \$175,000.00, approximately, for services I rendered that company.

When I returned from New York, I came home on the boat, and Mr. P. E. Titus, Vice President and General Manager of the Claims Department of the Liberty Mutual Insurance Company of Boston was on the boat, and I became acquainted with him on the boat. I brought him over to the house for dinner; he was going to San Francisco, and I put him back on the boat to go to San Francisco. He asked me whether I'd be interested in representing his company here in Los Angeles; I indicated I would be.

So, shortly thereafter, the local office began sending their cases over to me and since that time I have represented that company.

Mr. Titus ultimately died in 1948, and he came

(Testimony of Lyndol L. Young.)

here frequently; he was in my home when he came here, never was in my office at any time. It was not merely a matter of entertainment.

Q. Did you discuss legal business?

A. I didn't know him before 1935, when I met him—and well, no, I wouldn't say only legal matters, of course not.

He became a friend of mine and we discussed matters of general interest, and had dinner, and visited together, certainly, but cases, current cases, were then pending, would be reviewed and discussed, not only with Mr. Titus but also with the personnel here in California. [14]

Mr. P. H. Wilson, Vice President of the Company in San Francisco, came down here frequently; Mr. Walker, who was originally the Regional Claims Manager, came here, and would come to my home and review matters, or go to the club, the Country Club, primarily.

In connection with the Mutual—Liberty Mutual Insurance Company, subsequently, Mr. Litchfield, who became the Regional Claims Manager in San Francisco, would come to my home for a few matters with me.

I might say that work on these insurance company cases work would be done at my home, because of the fact that most casualty cases were based on claims investigation, and if I would take the file home I would find that I could work much better on these claims files in my home than down at the office.

(Testimony of Lyndol L. Young.)

In 1941, our youngest son was stricken with polio. I immediately closed my office, and it remained closed until almost the end of 1942. The boy was confined to an iron lung, was in the hospital many months, and then came home.

During that period of time, I had to, of course, take care of the Tierney estate and the Tierney children. That was all done in my home. I did take a small office over on Wilshire Boulevard, where Mr. Beller, my accountant, took care of the books and records of those two estates, and paid the bills, paid all the household bills and other incidentals, incidental to raising two children. [15]

In the latter part of 1942, Mr. Titus called me from Boston and stated that the company, Liberty Mutual Insurance Company, in a case in which the California Shipbuilding Corporation was involved in some X-ray burn cases that had developed in the shipyards in Long Beach, and they were very serious, some 65 men who worked in the shipyards were burned through exposure to roentgen rays, and he asked me if I would undertake to represent the company in those matters. They were very serious matters, very substantial matters to the company, also to their insured, California Shipbuilding Corporation.

He said that if I would open an office, he knew my office was closed, he would send two attorneys out from the Boston office to take care of the ordinary paper work in connection with those cases, which he did.

(Testimony of Lyndol L. Young.)

So in 1942, I again opened an office in the Citizens National Bank Building, and Mr. St. Clair came out from Boston, and Mr. McWaters came out, and they occupied the offices; I did very little work in the offices.

These matters did reach the courts. A number of the cases were heard in the Federal Court before Judge Peirson Hall, and I appeared in court. A number of the matters were over in the Superior Court of the State of California here in this county. Those matters would come up and I would appear.

My boy passed away in April of 1943, and even though I had this office, kept it up, I did very, very little work [16] except in connection with the two estates, which I referred to.

Q. You entertained people at your home?

A. I didn't do any work up until 1942, I mean except these X-ray burn cases. Then along about 1944 or 1945, I again resumed the——

Q. But your connection has been continuous down through the tax year 1952, and down to the present time?

A. Well, yes, it has been——

Q. In 1952, you made a substantial amount in connection with the Liberty Mutual Insurance Company case——

A. ——except for the time I would be in court, a great substantial amount of services rendered would be in my home.

Q. Did you also use the Los Angeles Country

(Testimony of Lyndol L. Young.)

Club in connection with the Liberty Mutual matters?

A. Yes, in connection with all business matters. My Club ceased to be a matter of any social interest or activity at the loss of our first son, and unfortunately, in 1948, we lost our oldest boy through polio, so insofar as——

Q. You have another client named Mr. Fewel who has paid—who paid you \$62,000.00 over the years.

A. In connection with Mr. Fewel, I met him at the Los Angeles Country Club through Mr. Denkins in 1946, and at that time he and his wife were having domestic troubles, so he was involved with her in a divorce action. I represented him along with you. That's where I met you, in connection with [17] Mr. Fewel, and I met you, as I recollect, at the Los Angeles Country Club, where Mr. Fewel was a member. This divorce action was pending in the Santa Monica Department of the Superior Court. Mr. Fewel lived in Beverly Hills in the Sunset Towers, which was near Beverly Hills in Hollywood. In connection with that action, which went over a considerable period of time in Santa Monica, all meetings with Mr. Fewel were either at the Los Angeles Country Club or in my home or in his apartment. Very few meetings took place in the office, although he did have an office in the same building at that time. Mr. Fewel's principal activity at that time was ranching in the San Joaquin Valley, so in connection with his divorce action, which

(Testimony of Lyndol L. Young.)

first started in Santa Monica and ended up in Long Beach, because Judge Rhoades, who heard it partially in Santa Monica, was transferred to Long Beach, and I went over to Long Beach over a period of some considerable time, and I also——

Q. Any conversations held at your home and also at the Los Angeles Country Club?

A. Mr. Fewel continuously was at the home. We would review what had happened in connection with the divorce action. Mr. Fewel paid me \$25,000.00 for those services. Also, Mr. Fewel was appointed as guardian of Frances Wood, guardian of her person and her estate.

Miss Wood's father, Frank M. Wood, under his will, had not, under his will, referred to and incorporated an [18] agreement which he made with Mrs. Wood when she obtained a divorce decree, to turn over to his daughter upon his death some insurance policies in the sum of about \$125,000.00, so I became her attorney, and we filed an action in the Superior Court making a claim on behalf of his daughter, Frank M. Wood's daughter, for this insurance money. The policies, at that time, were hypothecated with the First National Bank of Milwaukee, Wisconsin.

Upon filing this complaint and the service of the summons and the copy of the complaint on the local agent, the New York Life Insurance Company—Mr. Shirley, the attorney for the New York Life Insurance Company here, telephoned me and said the company would file an action in the Federal Court—

(Testimony of Lyndol L. Young.)

The Court: Do we have to go into all the issues, here? All this litigation could be endless, I'm sure. All I'm interested in is how his home was used, and the Club was used, for these things, without telling us so much of the issues of these cases.

The Witness: I think it would be better. I don't want to go into too much detail, yet I want to bring out the facts that these were essential matters.

The Court: I will give you the utmost latitude in establishing your use of your home and your Club for business.

Q. (By Mr. McEntee): Did Linnly Wood confer with you at your home and your Club? [19]

A. Yes, many, many times, in connection with the Estate of her father, and litigation growing out of that estate, and I was paid a fee of \$25,000.00 out of her guardianship estate.

Q. In connection with the Price Estate, did you use your home or the Country Club—the Los Angeles Country Club, and the Beach Club?

A. The Los Angeles Country and the Beach Club.

The Price Estate is of recent origin. Only last year, 1956, Mr. McEntee and I were associated with the Price Estate, but Mr. Price, Jack Price, Co-Executor of the Estate, came out here to represent him—and employed other counsel to represent him.

We talked to him on the telephone at his mother's house. I requested him to come to Los Angeles Country Club; his mother was a client of Mr. McEntee. He went there, and we had lunch and as a result, Mr. Price's mother came, too. He employed Mr. Mc-

(Testimony of Lyndol L. Young.)

Entee as his attorney for him, a Co-Executor, in association with myself, and as a result of services rendered up to the present time, Mr. McEntee and I have been paid \$84,000.00.

I would say that the entire relationship—the client relationship came through that meeting we had with Mr. Price at the Los Angeles Country Club.

Subsequent to that time, we have had numerous meetings with his mother, with himself and with Mr. Ferguson, the Trust Officer of the Security National Bank, the other Co-Executor. [20] Practically all the matters pertaining to the estate of his father, which is the Estate of \$3,000,000.00, we constantly held at the Country Club; none of those conferences took place at my home on North June Street, because I sold it in 1955; I didn't have it.

Q. Mr. Young, you mentioned Mr. Cord, and I have a note that during the period you were employed by him you were paid \$125,000.00. In the earning of those fees, did you feel—do you feel your home and your Club were used for business purposes.

A. Yes.

Q. In the past returns for 1948, 1949, 1950, and 1951, were these same items covering business expenses to the use of your home and your club reported and approved?

Mr. Reardon: I object, your Honor.

At this time, I'd also like to object as irrelevant all of this background. I admit that some of the background is material. I think we should be specific

(Testimony of Lyndol L. Young.)

in reference to prior years which are irrelevant and are not in the years before the court; this is solely in 1952.

The Court: What years are you asking about?

Mr. McEntee: There have been audited and approved the years 1948, 1949, 1950 and 1951. Substantial allowances were made for these business items, business expense on the use of the home and clubs.

The Court: How are you introducing it?

Mr. McEntee: I am asking him to state the amount he [21] deducted on his returns and were allowed on audit.

The Court: You may ask him.

The Witness: In 1948, \$5,456.73. That's for the expense of the home on June Street; 1949, the sum of \$4,747.76; and in 1950, the sum of \$4,998.70; 1951, the claim was made for the house and the club dues, \$12,456.08, lumped together that year.

On a review of the 1951 tax return, an additional assessment was made—paid October, 1952, of \$1,455.78. That review was handled with Mr. Beller, my accountant, and with the agents of the Internal Revenue Department, and resulted in her paying an additional assessment of \$1,455.78 which was found due for income for 1951, which I believe was \$50,000.00 for that year.

Mr. McEntee: I offer Mr. Young's check for \$1,455.78 in evidence.

Mr. Readon: Respondent objects on the ground it's irrelevant.

(Testimony of Lyndol L. Young.)

Q. (By Mr. McEntee): Mr. Young, will you briefly tell us——

The Court: What is the exhibit number; have you had this identified as an exhibit?

Mr. McEntee: No, I haven't; that must be identified now.

The Clerk: No. 2 for identification—Exhibit 2 for identification.

The Court: The Exhibit will be admitted. [22]

(Petitioner's Exhibit No. 2 was marked for identification and received in evidence.)

[See page 63.]

Q. (By Mr. McEntee): In connection with your business expenses, you took a travel deduction, Mr. Young, for \$3,500.00; will you tell us the nature of the trip in 1952?

A. It was of a business nature. There was one trip to Honolulu. I was in company with Mrs. Young. Part of the trip was business; part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted. I stayed there for a period of three weeks with Mrs. Young. The fare on United was \$691.00, and we stayed at the hotel for \$60.00 per day.

The Court: How much was the entire expenses claimed for travel?

The Witness: \$3,500.00.

The Court: And was all this for this one trip?

The Witness: No, your Honor.

(Testimony of Lyndol L. Young.)

The Court: How much was claimed for this one trip?

The Witness: \$1,500.00.

The Court: And you stayed how long?

The Witness: Three weeks, 21 days.

The Court: Does the Government contest the amount of that trip as \$1,500.00 for a trip to Hawaii and staying three [23] weeks.

Mr. Reardon: No, your Honor.

Q. (By Mr. McEntee): Mr. Young, in reporting your income tax return, you did not report the total amount for these trips?

A. The travel expense in 1952 was approximately \$7,500.00. I didn't claim the full amount because all of it was not connected with actual business matters. Part of the expenses were trips I made to Boston, New York.

Q. What was the business purpose of that trip?

A. To confer with the executives of the Liberty Mutual Insurance Company, which I did, and also my daughter's husband was in the Navy in Newport, and we visited with them; Mrs. Young went with me. I allocated \$1,000.00 as a business expense for this trip. The other travel expense is connected with local matters, going to Arizona in 1952, meeting with Mrs. Thompson at LaJolla, San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs. I think that \$3,500.00 out of the total expense of \$7,500.00 would be a fair division of the allocated business expense.

(Testimony of Lyndol L. Young.)

Q. Will you state your position as to the depreciation of the Cadillac car?

A. This Cadillac automobile was a 1949 Fleetwood Cadillac. When Mr. Beller left my services, and went to the Air Force, he left in 1952, and is still engaged with the Air Force in [24] Europe as an auditor—Chief Auditor, I discovered that he had not taken depreciation for 1949, 1950 and 1951 on this car, so in going over my return in March, 1953, I discovered he hadn't, so I took those three years depreciation, plus the depreciation for 1952, which makes up the \$4,000.00.

There had been no prior depreciation taken on this automobile, which I used in business exclusively.

That's the depreciation on it.

Mr. McEntee: That's all I have.

Cross Examination

Q. (By Mr. Reardon): Now, directing your attention to the taxable year 1952, is it true you claimed \$1,500.00 for automobile expenses?

A. Yes.

Q. And \$1,132.00 was allowed, in round figures?

A. Yes, I believe Mr. Wulke and I agreed to that, and I paid the additional taxes at that time, Mr. Reardon, as I recall, so that was not an issue in this hearing on the automobile maintenance.

Q. All right. Also in that year, telephone expense of \$835.00 was allowed, is that correct?

A. Approximately; I believe so, yes.

(Testimony of Lyndol L. Young.)

Q. Now, you claimed Club expense of \$2,145.00, is that true? A. Yes. [25]

Q. The amount approved being \$1,581.00 allowed?

A. Yes. That was the amount approved by Mr. Moore, the agent—field agent.

Q. Your travelling expense claimed, \$3,500.00?

A. Yes.

Q. Allowed, \$2,138.62?

A. I believe that is correct. Some of these figures weren't changed, but there were other figures, Mr. Wulke increased them, so I don't recall whether it's his figure or the original, and they allowed \$1,000.00 as to depreciation on the Cadillac for 1952.

Q. Let's talk about the Cadillac. That was all the Cadillac depreciation in that year? In other words, its value less a \$1,000.00 in that year?

A. Yes, that was the amount allowed.

Q. How did you get to work every day, down to the office?

A. I used this car as my car, and Mrs. Young had a car she drove.

Q. Drove the Cadillac to work and home?

A. Yes.

Q. This is the only car you ever drove?

A. Well, this was Mrs. Young's—Mrs. Young had a car; I may have driven it, too, at different times, maybe on a Sunday or weekend.

Q. Do you recall the amount of automobile expenses you [26] claimed in 1952 on Mrs. Young's car?

(Testimony of Lyndol L. Young.)

A. No, the expenses that have been claimed by me in 1952, which have been agreed upon in the settlement, which are not an issue in this case, I think, is reduced from \$1,500.00 to \$1,000.00, if my recollection—I paid the additional tax on that item, plus the telephone item, and those two items were removed from any contention in this particular hearing. It is my understanding the only issue involved is the depreciation for the prior years, and——

Q. Now, in these automobile expenses allowed, isn't it true those include expenses for parking, repairs, gasoline, etc.? A. Yes.

Q. When did you use your automobile for business purposes?

A. During the year 1952?

Q. 1952.

A. All the time, when I was here.

Q. Did you ever use it for any personal purposes?

A. Well, I probably did over a week end or a Sunday, certainly, take my wife for a drive in the park with the car.

Q. Now, also in 1952, your home phone expense was \$433.80, and you determined that \$285.31 was a business expense, and that was allowed by the Commissioner, is that correct?

A. Yes, Mr. Wulke allowed one-half of the phone bill on the house on June Street. [27]

Q. Did you have any records that showed the

(Testimony of Lyndol L. Young.)

segregation of the home phone as to business or personal calls? A. No.

Q. Do you recall how the agent segregated the amount claimed as Club expense? In other words, you claimed \$2,154.00, and he allowed \$1,008.00, the basis for segregation being that the \$1,008.00 was the club dues.

A. That's my recollection, that he only allowed the dues.

Q. The amount disallowed were the services obtained at the club and paid for at the end of the month? A. Yes.

Q. What clubs were those?

A. The Los Angeles Country Club and the Stock Exchange Club on Spring Street, downtown, and the Beach Club in Santa Monica.

Q. Was there another club involved, a Sports club?

A. Maybe the University Club. I didn't join the University Club until 1953. When I was in the Citizens National Bank Building on 5th and Spring, I went to the Stock Exchange Club. I moved over with Mr. McEntee in September, 1952, to the General Petroleum Building, and joined the University Club.

Q. Do you have any records of the amount you spent at the Country Club?

A. I have got my bills in the office that the agent went over; I didn't bring them with me. [28]

Q. How about the Stock Exchange Club?

(Testimony of Lyndol L. Young.)

A. Those, too, my bills and my statements and my checks, and payments of them, and——

Q. The agent went over them?

A. Yes.

Q. So, too, for the Beach Club?

A. Yes, all the clubs.

Q. Do you have any records indicating when you held any conferences at the Los Angeles Country Club in 1952? A. In 1952?

Q. All my questions are directed to 1952.

A. No, no record except the recollection of myself and Mr. McEntee, who was there with me on numerous occasions.

Q. What clients did you have conferences with in 1952 at the Los Angeles Country Club?

A. Principally with Mr. Fewell, whose divorce action I have testified about, but in 1952 conferences with Mr. Fewell at the Country Club, were in connection with the Bullock Estate.

Q. Anyone else besides Mr. Fewell?

A. In 1952?

Q. That is correct.

A. Mr. Litchfield of the Liberty Mutual Insurance Company.

Q. What occasions?

A. Well, I couldn't say definitely. He came down here [29] from San Francisco, and he liked to discuss matters at the Country Club, I would say, rather than downtown.

There were a number of cases pending in 1952 for the Liberty Mutual Insurance Company that

(Testimony of Lyndol L. Young.)

were serious, substantial matters that he came down frequently to review.

Mrs. Thompson was at the Country Club in 1952 in connection with matters growing out of the estate of her husband, who died in 1950, the estate just being wound up in 1952, and also in connection with the sale of their home property in Phoenix, Arizona, which she was negotiating a sale for in 1952, and I had been her investment counselor for many years.

Q. In 1952, your only profession and source of income was as attorney, though there was some background of discussion of investments——

A. Well, I was a Trustee of the estate—the Tierney Estate and Kelly Estate, and substantial fees came to me as Trustee. Not only as attorney, but in the capacity of fiduciary, and also as guardian of the Tierney children.

Q. With whom, in 1952, did you have conversations at the Beach Club?

A. Well, I couldn't pin that down.

Q. How about the Stock——

A. He was down here——

Q. How about the Stock Exchange?

A. Well, I had numerous conferences at the Stock [30] Exchange with Mr. Featherstone and Litchfield of the Liberty Mutual Insurance Company in connection with matters that would be coming up for trial. When we were having trials, he would come to court and during the noon hours we would go down to the Exchange for lunch and discuss——

(Testimony of Lyndol L. Young.)

Q. Never came to your office downtown?

A. Mr. Featherstone?

Q. Yes.

A. Yes, he had been to my office frequently. There was an important matter in 1952, also, that required the use of the Stock Exchange Club, and that was a case of Goodrich Tire & Rubber Company, and associated with me in that case was the law firm of Newland, Tackabury and Johnson, and we frequently met at the Exchange; they're located here in Los Angeles.

Q. Did you have occasion to go there often?

A. I used Tackabury's office practically altogether in connection with the pleading work and the paper work in this litigation, because he was the attorney for the Rubber Company, and I was the attorney for the Liberty Mutual Insurance Company.

Q. Now, the Beach Club is in effect a country club, isn't it?

A. Well, there is no golf course there, but it's a summer club; it's a three months proposition during the summertime.

Q. Did you have occasion to take Mrs. Young to the Beach [31] Club?

A. She doesn't like the beach. I have taken her to dinner——

Q. Do you play golf?

A. I haven't played this year, I don't believe.

Q. Did you play in 1952?

A. No, no, I lost all interest in the game of golf

(Testimony of Lyndol L. Young.)

when my boy died. I don't think I've played more than three or four games in the last ten to twelve years.

Q. Did you have occasion to ever take any friends to dinner at these various clubs?

A. No, not outside of these parties or persons I mentioned from out of town who would come here to Los Angeles. I don't say exclusively not, no.

Q. How about Mrs. Young?

A. Oh, yes, of course she would. We go out there most every Sunday for our lunch.

Q. Were there occasions when she went with a friend or two and had lunch?

A. She may have herself, yes.

Q. Now, back to the trip to Boston, what was the duration of that in 1952?

A. For about two weeks I was in Boston for only two days.

Q. For the Liberty Mutual Insurance Company?

A. Yes. [32]

The Court: At this time, the Court will take a recess for about ten minutes.

(Recess taken.)

Q. (By Mr. Reardon): Now, directing your attention to the amounts claimed on the business promotional expense in 1952, and substantiating this claim you submitted cancelled checks to the agent?

A. Yes.

Q. And these include amounts for—now, correct me if I am mistaken: Butler, poultry, plumbing, cleaning, and laundry, groceries, miscellaneous

(Testimony of Lyndol L. Young.)

household, water, power and gas, garden, vegetables, yard maintenance, electric maintenance, florist and milk.

A. All those items are everything connected with the operation of the premises and the maintenance of living there.

Q. Your home there on North June Street in the year 1952 was adjacent to the Wilshire Country Club?

A. Yes.

Q. Isn't that a very lovely residential area?

A. Yes, Hancock Park. I didn't belong to the Wilshire Country Club.

Q. I'm merely making that notation to show that it is a desirable residential area.

Now, in the audit of your return for 1952, amounts in excess of the amount you claimed for office supplies were [33] allowed, were they?

A. I believe Mr. Moore, the field agent, did find that I didn't add up all the expenses and office supplies; I didn't have the correct figure.

Q. Also postage?

A. I think so, Mr. Reardon. I think there were certain increases in connection with office expense.

Q. Was your basis for claiming \$1,500.00 as automobile expense in the year 1952 the fact that you had claimed the same amount in previous years, and this had been allowed?

A. Yes, I believe so. I think that amount had been claimed and allowed.

Q. Is it true that your sole reason, on the basis for taking these deductions, is that you regarded in

(Testimony of Lyndol L. Young.)

view of your gross income these amounts were reasonable?

A. Well, I felt that they were reasonable to the extent of the cost of the maintenance of the premises, and there was a reasonable allocation to the over-all cost, yes, and I also thought in relation to the income received in the year 1952, it was a reasonable allocation of expense. The total expense of maintaining my home in 1952 was approximately \$20,000.00.

Q. Now, as to the operation of your downtown office, were you in with any other attorneys during your——

A. Up until September of 1952, my office was located at the Citizens National Bank at 5th and Spring.

Q. That's where your legal secretary was? [34]

A. Yes, that is correct, and that is where my accountant worked.

Q. Were any of these employees in your home for business purposes?

A. Oh, yes, Mr. Beller was there many times.

Q. He is the accountant?

A. The accountant, yes.

Q. How about the secretary?

A. I don't believe Mrs. Petri, who was with me in 1952, was ever in my home.

Miss Osborne was in my home on numerous occasions.

Q. In 1952?

A. No, she wasn't with me in 1952.

(Testimony of Lyndol L. Young.)

Q. Did you have any office machinery in your home, typewriters?

A. Telephones, was all.

Q. How about your business correspondence, was that all filed from your office?

A. Yes, whatever dictation would take place would many times be over the telephone to my secretary, but the letters would be transcribed in the office. I have a library and room devoted entirely to the office.

In September 1952, I went into an office with Mr. McEntee, and we have continued that association since 1952 at the General Petroleum Building.

Mr. McEntee is a tax lawyer experienced in tax work.

Q. Also in the auditing and recomputation of your return weren't additional amounts allowed for office supplies and so-called miscellaneous office expense?

A. I think so, Mr. Reardon, periodicals.

Q. And legal and accounting expenses?

A. I believe there were some slight increases on those various items.

Q. Two last questions, Mr. Young: Is it true that you have no records, or kept no records, in 1952, of the business conferences you had at the various places?

A. No, I have no written records.

Q. And your entire basis of claim of these deductions was your estimate of these amounts as

(Testimony of Lyndol L. Young.)

being reasonable and in relation to your gross income?

A. Yes, and in addition to that, to the matters, from my records, which are reviewed, covering the service, my legal service, and in cases I handled in 1952, the amount of work that appeared from those records I did in my home, and at the Country Club as well, and the Stock Exchange Club.

Q. One of the fees that you received in 1952 was approximately \$25,000.00 from this Arizona—the Filor matter? A. Yes.

Q. And that was received in 1952?

A. January of 1952. [36]

Q. Wasn't all the work on that done prior to 1952?

A. Yes, the work was all done, completed in 1951.

Q. These other cases that you and your clients discussed in your background, Filor, Hiller, Tierney, and so forth, these were all transpired before 1952?

A. Well, no, the Hiller matter was in 1951, and the payment was made in 1952.

Mr. Reardon: The Respondent rests, your Honor.

Redirect Examination

Q. (By Mr. McEntee): Mr. Young, in connection with the use of your clubs for business purposes, do you have conferences with bankers, brokers, investment counsel, and other business men while you are at those clubs? A. Yes.

(Testimony of Lyndol L. Young.)

Q. And did you find that essential or helpful in your law practice and investment advisory service?

A. Yes, decidedly so. It's a facility that I wouldn't have available to me except out at the Country Club.

In addition, there are a number of doctors at the Los Angeles Country Club I know, and I try a considerable amount of malpractice cases involving hospitals and members of the medical profession.

Q. In regard to Mr. Reardon's question that these amounts attributed to business expenses being regarded as reasonable in [37] relation to your income, I want to ask you if there is any question in your mind these amounts were actually spent—considered—taken as expenses allowed, as expenses over a period of many years, and you have the checks and presented the revenue agent——

A. Yes, we have gone over all the checks and bills.

Mr. McEntee: As an associate of Mr. Young, I would just say briefly that he spends more time and does more work and makes more money out of his activities in his home and at his club than he does at the office.

Mr. Reardon: I object, your Honor. If counsel wishes to take the stand——

Mr. McEntee: It has been my experience, that's all.

The Court: I guess that's all.

Mr. Reardon: I have a question.

(Testimony of Lyndol L. Young.)

Recross Examination

Q. (By Mr. Reardon): All of these checks that you presented to the Revenue Agent were made out to cash, is that not correct?

A. Oh, no, the checks were made out to cash and covered cash disbursements for this \$3,100.00.

Q. But the others were made out either to the clubs——

A. Oh, yes, directly to the payee, whoever it might be, in connection with the particular expense involved. There was only \$3,000.00 involved in the checks to cash. [38]

The Court: I guess that's all.

The Witness: Thank you, your Honor.

Mr. Reardon: Respondent rests.

The Court: The cause is submitted. Do you wish to file briefs?

Mr. McEntee: No, I don't think so; it's just a matter of fact.

Mr. Reardon: Yes, your Honor.

The Court: Under the rules, it's 45 days.

Mr. Reardon: Respondent has no objection to filing a simultaneous brief.

The Court: You don't need to, but you can file simultaneous briefs in 45 days.

The Clerk will give you the dates.

The Clerk: July 22nd for the original briefs; August 21st for the reply briefs.

(Whereupon, at 12:30 o'clock, p.m., the hearing in the above entitled matter was closed.)

[Endorsed]: Filed July 9, 1958.

[Title of Tax Court and Cause.]

JOINT MOTION TO CORRECT THE RECORD

The parties move jointly that the Court correct the trial record to read as follows:

P. 9, Line 1: "\$7,000.00" should be changed to "\$70,000.00."

P. 9, Line 2: "\$45,000.00" should be changed to "\$40,000.00."

P. 9, Line 6: Between the words "Mrs." and "Iten" insert the word "Katherine"; and in lieu of the word "Catherine", insert the words "her daughter Mrs.".

P. 9, Line 11: "We" should be changed to "I".

P. 9, Line 17: "Him" should be changed to "my".

P. 9, Line 24: The word "Tierney" should be omitted.

P. 10, Line 20: The word "Tierney" should be omitted.

P. 11, Line 3: Omit the word "both"; between the words "Estate" and "Mrs." insert the word "of" in lieu of "and"; insert the word "Iten" in lieu of "Tierney".

P. 11, Line 9: After the word "sisters" insert the words "paid you \$15,000.00".

P. 11, Line 6: "1942" should be changed to "1952".

P. 11, Line 10: At the beginning of the line, before the word "the", insert the words "in 1952,".

P. 11, Line 17: Correct the name "Litten" to read "Lyttten".

P. 11, Line 18: The words "case of" should be changed to "decision"; the word "had" should be changed to "has".

P. 11, Line 19: Correct the name "Lane" to read "Laine".

P. 11, Line 21: Correct the name "Litten" to read "Lytten".

P. 12, Line 14: Between the words "them" and "their" and in lieu of the words "would be in there, and" insert the words "were in my home with". Between the words "husbands," and "nieces", and in lieu of the word "with", insert the words "they were".

P. 12, Line 15: Between the words "years," and "at", insert the words "they were in". The word "for" should be changed to "on".

P. 12, Line 17: The word "included" should be changed to read "concluded". Between the words "concluded" and "1951", insert the word "in".

P. 13, Line 1: Change "\$6,000.00" to "\$60,000.00". Between the words "I" and "for", and in lieu of the words "rented a building", insert the words "rendered a bill". Change "\$20,000.00" to "\$25,000.00".

P. 13, Line 3: Change "\$20,000.00" to "\$25,000.00".

P. 13, Line 17: Between the words "claim" and "either", insert the word "that".

P. 13, Line 18: Between the words "expenses" and "some", and in lieu of the words "have any substantial claims", insert the words "are for entertainment".

P. 14, Line 1: "\$17,000.00" should be changed to "\$175,000.00".

P. 14, Line 17: Between the words "was" and "merely", insert the word "not".

P. 15, Line 10: Between the words "that" and "these", insert the words "work on".

P. 16, Line 16: Correct the name "Sinclair" to read "St. Clair".

P. 16, Line 17: Correct the name "Waters" to read "McWaters".

P. 17, Line 22: Change the name "Wulke" to read "Denkins".

P. 18, Line 14: Change the name "Hodd" to read "Rhoades".

P. 18, Line 24: Change "Mrs. Wood's" to read "Miss Wood's".

P. 19, Line 4: Change "his" to "her".

P. 19, Line 7: Between the words "were" and "with", insert the word "hypothecated".

P. 19, Line 24: Correct the name "Linny" to read "Linnly".

P. 20, Line 13: Between the words "talked" and "on", insert the words "to him".

P. 20, Line 16: Change "Mrs. Price's" to read "Mr. Price's".

P. 21, Lines 7-12: Change the wording of these lines to read "that during the period you were employed by him you were paid \$125,000.00. In the earning of those fees, did you feel—do you feel your home and your Club were used for business purposes? A. Yes. Q. In the past returns for 1948, 1949, 1950, and 1951, were these same items covering busi-

ness expenses to the use of your home and your club reported and approved?"

P. 21, Line 20: Change the word "proved" to "approved".

P. 21, Line 22: Change the word "this" to "these", and change the word "item" to "items".

P. 22, Line 1: Change the word "paid" to "deducted" and add "on his returns and were allowed on audit".

P. 22, Line 11: In lieu of the words "plus, in 1952" insert the words "and resulted in her".

P. 22, Line 12: Between the words "assessment" and "which", insert the words "of \$1,455.78".

P. 22, Line 13: After Line 13, insert these words "Mr. McEntee: I offer Mr. Young's check for \$1,455.78 in evidence."

P. 23, Line 5: Omit the words "I want to emphasize it".

P. 23, Line 6: Change the first word "was" to read "There was".

P. 24, Line 6: Between the words "the" and "expense", insert the word "travel".

P. 24, Line 7: In lieu of the words "they weren't", insert the words "all of it was not".

P. 24, Line 8: Omit the words "I mean", and in lieu of the word "trips", insert the word "expenses".

P. 24, Lines 13-20: Change the wording of these lines to read "was in the Navy in Newport, and we visited with them; Mrs. Young went with me. I allocated \$1,000.00 as a business expense for this trip. The other travel expense is connected with

local matters, going to Arizona in 1952, meeting with Mrs. Thompson at LaJolla, San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs. I think that \$3,500.00 out of the total expense of \$7,500.00 would be a fair division to be allocated for business expense."

P. 25, Line 4: Between the words "three" and "depreciation", insert the word "years".

P. 27, Line 5: Change the words "Mr. Kelly" to "I".

P. 28, Line 20: Change "1949" to "1952", and after the last word of this line, add "General".

P. 29, Line 12: Between the words "except" and "recollection", and in lieu of the word "any", insert the word "the". Between the words "of" and "Mr. McEntee", insert the words "myself and".

P. 29, Line 17: Omit the word "the".

P. 29, Line 18: Omit the words "it was", and in lieu thereof, insert the word "were".

P. 31, Line 1: Omit the words "Peterson, and at", and in lieu thereof, insert the words "Featherstone and Litchfield of".

P. 31, Line 7: Change "Feltston" to "Featherstone".

P. 31, Line 13: Change "Newland, Thackaberry and Johnston" to "Newlin, Tackabury and Johnston".

P. 31, Line 16: Change "Thackaberry's" to "Tackabury's".

P. 32, Line 8: Change "I was a young boy" to read "my boy died".

P. 32, Line 16: Change "We'd" to read "We", and add the word "most" after the word "there".

P. 34, Line 20: After the last word "expense.", add this sentence, "The total expense of maintaining my home in 1952 was approximately \$20,000.00."

P. 35, Line 16: Omit the word "Dictaphones" and capitalize the word "Telephones" as the first word of the sentence.

Wherefore, it is prayed that this motion be granted.

/s/ FRANCIS J. McENTEE,
Counsel for Petitioners

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue
Service, Counsel for Respondent.

[Stamped]: Granted August 14, 1957. /s/ John E. Mulroney, R. Judge.

Served and Entered August 19, 1957.

[Endorsed]: T.C.U.S. Filed August 13, 1957.

JOINT LIAISON No. 1-A

FORM 1040

U.S. Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1952**FOR CALENDAR YEAR 1952**

1952

or taxable year beginning 1952, and ending 1955

Do not write in these spaces

Name Lyndol L. and Mildred W. Young

NAME Lyndol E. and Margaret W. Young
 (PLEASE PRINT. If this is a joint return of husband and wife, use first names of both.)

HOME ADDRESS 153 No. June Street
(PLEASE PRINT, Street and number or rural route)

PLEASE PRINT. Street and number of Rural Route

Los Angeles 4, California

(City, town, or P.M. Box) (Postal zone number) (State)
Atty-At-Law & Tru

Social Security No. _____ Occupation Investment

Atty-at-Law & Trust
Occupation: Investment

Occupation: NEW YORK

Serial
No. 263025840

MAR 16 1953

0002 List your name. If your wife (or husband) had no income, or if this is a joint return, list also her (or his) name.

A Lyndol L. Young

Mildred W. Young

(Your wife's name—do not list if exemption is claimed on another return)

C. List names of your children (including stepchildren and legally adopted children) with 1952 gross incomes of less than \$600 who received more than one-half of their support from you in 1952. See Instructions.

D. Enter number of exemptions claimed for close relatives listed in Schedule I on page 2

E. Enter total number of exemptions claimed in A to D above 2

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1952, before payroll deductions. Persons receiving a refund of reimbursed expenses, see instructions.

[illegible]

3. If you received dividends, interest, or any other income, give de-

4. Add income shown in items 2 and 3, and enter the total here \$ 27,615.75

Before figuring your tax, see Schedule J for "Head of Household." If you claim such status, check here. ☐ **IF YOUR INCOME WAS LESS THAN \$3,000.**—Use the tax table on page 4 unless you itemize deductions. The table allows about 10 percent of your income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3. **IF YOUR INCOME WAS \$5,000 OR MORE.**—Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

5. (A) Enter your tax from table on page 4, or from line 13, page 3.

(B) Enter your self-employment tax from line 35, separate Schedule C:

6. How much have you paid on your 1952 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(b) If you paid in 1954 overpayment in estimated tax (include any overpayment on your 1951 tax not claimed as a refund)

7. If your tax (item 5) is larger than payments (item 6), enter
balance of tax due here. This balance must be paid in full with return. Enter total here →

	7,072	52
\$ 257	18	

8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment* here. \$
Enter amount of item 8 you want \$ \$

Enter amount of item 8 you want \$ _____ \$ _____
(Refunded) (Included on 1993 estimate tax)

Do you owe any price year Federal tax for which you have been billed? (Yes or No) NO Is your wife (or husband) making a separate return for 1952? (Yes or No) NO If "yes," write her (or his) name _____
If you have filed a return for a prior year, please attach 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2

If you have filed a return for a prior year, state latest year 1951 Where filed? Los Angeles
To which director's (formerly collector's) office did you pay amount claimed in item 6 (B), above? Los Angeles

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return.) (Date) (Signature of taxpayer) (Date)

(Name of firm or employer, if any) _____

To secure split-income benefits, husband and wife must include all their income and, even though only one has income, BOTH MUST SIGN.

Joint Exhibit 1-A
(continued)

50

LYNDOL L. YOUNG

A Statement attached to and made a part
of Federal and California Income Tax
Returns for the calendar year 1952.

SCHEDULE C-2

Subscriptions and periodicals	\$ 524.69
Legal and Accounting	1,500.00
Automobile Expense	1,500.00
Office Supplies	270.00
Telephone and Telegraph	635.00
Legal Association dues	69.00
Postage	79.00
Workmen's Compensation	48.39
Clubs	2,154.00
Business promotional expense, 138 No. June Street-	9,453.62
Travel	3,500.00
Miscellaneous	707.92
TOTAL	<u>\$21,681.62</u>

2

Joint Exhibit 1-A
(continued)

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION

1952

(For Computation of Self-Employment Tax, see Page 3)

PREPARED BY (Print name)
C. E. Young & Co., Inc.
Certified Public Accountants

For Calendar Year 1952 or taxable year beginning, 1952, and ending, 195

Name and Address (from Form 1040) Lyndol L. and Mildred W. Young 138 No. June St.
Los Angeles 4, Calif.

(Partnerships and joint ventures should file on Form 1065)

(I) Principal business activity (see instructions) Att'y-at-Law & Trustee & Investment Advisor
(Retail trade, wholesale trade, lawyer, etc.) (Principal product or service)

(II) Business name Lyndol L. Young (III) FICA employer identification number, if any (see instructions)

(IV) Business address (see instructions) 612 So. Flower St. Los Angeles 17, Calif.
(Street and number or rural route) (City, town, post office) (Country) (State)

(V) Were you the sole proprietor of this business in 1951? Yes ☐ No ☐ If "No," check whether this business in 1951 became a successor to a corporation ☐ a partnership ☐ another sole proprietorship ☐ or started as an entirely new business ☐ Where applicable, give name of such predecessor

Do NOT include cost of goods withdrawn for personal use or deductions not connected with your business or profession

1. Total receipts from business or profession	\$61,426.00
COST OF GOODS SOLD	
2. Inventory at beginning of year	\$
3. Merchandise bought for manufacture or sale	\$
4. Cost of labor	
5. Material and supplies	
6. Other costs (explain in Schedule C-2)	
7. Total of lines 2 to 6	\$
8. Less inventory at end of year	
9. Net cost of goods sold (line 7 less line 8)	
10. Gross profit (line 1 less line 9)	\$61,426.00

OTHER BUSINESS DEDUCTIONS	
11. Salaries and wages not included in line 4	\$ 3,054.25
12. Rent on business property	4,644.00
13. Interest on business indebtedness	
14. Taxes on business and business property	180.18
15. Losses of business property (attach statement)	
16. Bad debts arising from sales or services	
17. Depreciation and obsolescence (explain in Schedule C-1)	4,000.00
18. Repairs (explain in Schedule C-2)	
19. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)	
20. Amortization of emergency facilities (attach statement)	
21. Other business expenses (explain in Schedule C-2)	21,681.62
22. Total of lines 11 to 21	33,560.05
23. Enter net profit (or loss) (line 10 less line 22). Also enter on line 24, page 3, and on line 1, Schedule C Summary, Form 1040	\$

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (if building, also specify if mobile home, trailer, boat and other depreciable property)	2. Date acquired	3. Cost or other basis	4. Depreciation claimed (or allowable) in prior years	5. Depreciation and other basis to be recovered	6. Life and to be depreciated	7. Estimated life beginning of year	8. Depreciation allowable for year
Cadillac Fleetwood Model 1949	12-48	\$ 5,200.00	-	\$ 4,000.00	5 yrs.	1 yr.	\$ 1,000.00

Schedule C-2. EXPLANATION OF LINES 6, 18, AND 21

Line or Column No.	Explanation	Amount	Line or Column No.	Explanation	Amount
	Schedule	\$			\$

Joint Exhibit No. 1-A--(Continued)

ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 1 BELOW— Page 1
If Husband and Wife (Not Legally Separated) File Separate Returns and One Is a Defendant, the Other Must Also Itemize

Contributions	Describe Deductions and enter in whole and in cents with a dollar sign, unless otherwise stated.		
	Community Chest	\$ 175.00	
	St. Vincent's Hospital Auxiliary	10.00	
	Sheriff's Association	12.50	
Allowable Contributions (not in excess of 30 percent of item 4, page 1)		\$ 197.50	
Interest	Interest Security-First National Bank	\$ 405.27	
	Aetna Life Ins. Co.	140.88	
	State of California	.01	
	U. S. Government	13.67	
Total Interest		\$ 589.81	
Taxes	Los Angeles County	\$ 1,059.73	
	State of Calif. Income taxes	379.78	
	State of Calif. Sales tax	665.00	
	Eu. Assess. 8.70, Soc. Sec. 35.75, Safe Dep.	44.69	
	Total Taxes	\$ 2,134.21	
Losses from fire, storm, or other casualty, or theft			
	Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses (if over 65 see Instructions)			
	Net Expenses (not compensated by insurance or otherwise)		
Miscellaneous (See Instructions)	Enter 5 percent of item 4, page 1, and subtract from Net Expenses.		
	Allowable Medical and Dental Expenses. See Instructions for limitation.		
	Premium Accident & Health Ins. Policy	\$ 169.27	
Total Miscellaneous Deductions		\$ 169.27	
Total Deductions		\$ 3,090.79	

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 4, page 1. This is your Adjusted Gross Income	\$ 27,675.95	✓
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized and line 1, above, is \$5,000 or more: (a) married persons filing separately enter \$500, (b) all others enter 10 percent of line 1, but not more than \$1,000.	3,090.75	✓
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	\$ 24,585.20	✓
4. Multiply \$800 by total number of exemptions claimed in item 1E, page 1. Enter total here.	1,200.00	✓
5. Subtract line 4 from line 3. Enter difference here. (If line 1 includes partially tax-exempt interest, see Instructions).	\$ 23,385.20	✓
If line 5 is not more than \$2,000—		
6. Enter 22.2 percent of amount shown on line 5 and disregard lines 7, 8, and 9.	\$	
If line 5 is more than \$2,000—		
7. And you are a single person, a married person filing separately, or a head of household		
Single persons and married persons filing separately use Tax Rate Schedule I on page 12 of Instructions to figure tax on amount on line 5; heads of household use Tax Rate Schedule II.		
8. And you are filing a joint return—		
(a) Enter one-half of amount on line 5.	\$ 11,692.60	✓
(b) Use Tax Rate Schedule I on page 12 of Instructions to figure tax on amount on line 8 (a).	3,655.00	✓
(c) Multiply amount on line 8 (b) by 2.	\$ 7,310.00	✓
9. If alternative tax computation is made, enter here tax from separate Schedule D.	\$	
Disregard lines 10, 11, and 12, and copy on line 13 the same figure you entered on line 6, 7, 8 (c), or 9, unless you used itemized deductions.		
10. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).	\$	
11. Enter here any income tax paid at source on tax-free covenant bond interest.	\$	
12. Add the figures on lines 10 and 11 and enter the total here.	\$	
13. Subtract line 12 from line 6, 7, 8 (c), or 9. Enter difference here and as item 5 (A), page 1.	\$ 7,330.00	✓

No 3079

October 2th 1952

LYNDOL L. YOUNG

STATIONER & PRINTER - Calif

PAY TO THE ORDER OF

\$ 1499.45

DOLLARS

Collection of 27 4490 income

11 4490 11.5 20018

11 4490 11.5 20018

1 - HEAD OFFICE - 16-11

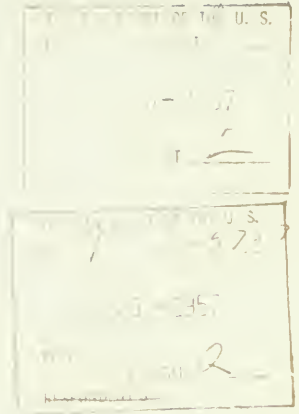
457 South Spring Street
CITIZENS NATIONAL BANK
TRUST & SAVINGS

LOS ANGELES

Lyndol L. Young

CHARGE
GROSS AMOUNT
DISCOUNT
AMOUNT PAYABLE

PAY TO ORDER OF
LOS ANGELES BRANCH
FOR ALL
TREASURY DEPARTMENT
COLLECTOR INTERNAL REVENUE
6TH DIST. CALIF.



U. S. Treasury Department, Internal Revenue Service, Chief, Audit Division, P. O. Box 231, Main Office, Los Angeles 53, California.

Office of Director of Internal Revenue

In Replying Refer to: A:R:30D MI 8111, Ext. 385,
Room 1339, Federal Building

Mr. Lyndol L. Young Aug. 24, 1954

Mrs. Mildred W. Young

138 North June Street, Los Angeles 4, California

Dear Mr. and Mrs. Young:

The attached report, which has been carefully reviewed by this office, discloses certain adjustments or conclusions resulting from the examination of the return(x) for the taxable year(x) indicated therein.

If you accept the findings, please execute the enclosed agreement form and return it to this office promptly. If you do not accept the findings, you may, within 30 days from the date of this letter, file a protest in accordance with the enclosed instructions. Any protest filed will be given careful consideration and, if requested, a conference will be granted by the Appellate Division of the District Commissioner's office.

Submission of the agreement form will expedite assessment of the proposed deficiency and stop the running of interest thereon 30 days after the receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier. If desired, payment of the proposed deficiency may be

made without awaiting assessment by making remittance therefor payable to the Director of Internal Revenue, P. O. Box 231, Main Office, Los Angeles 53, Calif. at the address shown above, enclosing this letter or a copy thereof. The remittance should include interest on the additional tax (exclusive of penalties, if any) computed at 6% per annum from the due date of the return to the date of the payment.

This is not a statutory notice of deficiency. If, however, upon the expiration of the 30-day period you have not submitted the agreement form, or a written protest, or you have not advised that the deficiency has been paid or will be paid upon notice and demand, a statutory notice will then be sent you as provided by law.

Prompt execution and return of the enclosed receipt form indicating your position with respect to the findings disclosed by the report will be greatly appreciated.

Important: It is essential that communications transmitting protests or agreements relative to this letter be addressed to the Director of Internal Revenue, Audit Division, P. O. Box 231, Main Office, Los Angeles 53, California, Attention A:R:30D.

Very truly yours,

/s/ R. A. RIDDELL,

Director of Internal Revenue.

hmg

Enclosures: Report of Examination, Agreement Form, Receipt Form, Instructions.

Name of Taxpayer: Lyndol L. and Mildred W. Young.

Date of Report: Aug. 6, 1954.

Examining Officer: F. Howard Morris.

Preliminary Statement of Total Tax Liability
Year 1952.

Adjustments Proposed by this Report: Tax, Deficiency: 9456.28.

* * * * *

Preliminary Statement

The principal cause for the deficiency is the disallowance of expenses claimed as Promotional expense—138 No. June Street.

Taxpayer's are married and reside at 138 No. June Street, Los Angeles. They have no dependents.

The case has been discussed with the taxpayer Lyndol L. Young who does not agree with the findings. The taxpayers contention is that all amounts expended by him during the year are for business purposes.

Schedule 1

Name: Lyndol L. and Mildred W. Young.

Year ended 12-31-52.

Adjustments to Net Income

Net income as disclosed by return: \$24,575.16.

As corrected: \$42,094.01.

Net adjustment as computed below: \$17,518.85.

Unallowable deductions and additional income:

(a) Clerical error: \$200.00.

(b) Unreported income: \$1,150.00.

(c) Auto expense: \$1,000.00.

(d) Telephone and telegraph: \$285.31.

(e) Clubs: \$1,146.00.

(f) Business promotional expense—138 No. June St.: \$9,493.62.

(g) Travel: \$1,341.38.

(h) Accident and Health Premium: \$169.27.

(i) Depreciation: \$3,000.00.

Total: \$17,785.58.

Nontaxable income and additional deductions:

(j) Subscription and Periodicals: \$14.56.

(k) Legal and accounting: \$50.00.

(l) Office supplies and miscellaneous: \$200.17.

(m) Postage: \$2.00.

Total: \$266.73.

Net adjustment as above: \$17,518.85.

Schedule 1-A

Name: Lyndol L. and Mildred W. Young.

Year: 1952.

Explanation of Items

(a) Clerical error: \$200.00.

Adjusted Gross income on return 27665.95.

Corrected adjusted gross income: 27865.95.

Addition to net income: \$200.00.

Taxpayers total other business deductions subtracted from gross receipts leaves 27865.95 instead of 27665.95 as reported on the return resulting in an understatement of Adjusted gross income of \$200.00, therefore, this amount is added to net income.

(b) Unreported income: \$1,150.00.

Taxpayer failed to include \$1,000.00 of trust income and \$150.00 insurance fee in his gross receipts. The total of these two items \$1,150.00 is hereby added to net income.

(c) Auto expense: \$1,000.00.

Claimed on the return: \$1,500.00.

Allowed: \$500.00.

Addition to net income: \$1,000.00.

Taxpayer's claim of \$1,500.00 auto expense is reduced to \$500.00 as taxpayer is also entitled to depreciation of \$1,000.00 which is allowed (see item "i" of this report), and taxpayer failed to substantiate more than \$500.00 of business automobile expense; therefore, the amount of \$1,000.00 is returned to net income.

(d) Telephone and telegraph: \$285.31.

Claimed on the return: \$835.00.

Allowed: \$549.69.

Addition to net income: \$285.31.

Taxpayers office telephone expense amounted to \$549.69 and this amount is allowed as a deduction on the return. Taxpayer failed to show other telephone and telegraph expense connected with his business so the excess of \$285.31 over the allowable office expense is returned to net income.

(e) Clubs: \$1,146.00.

Claimed on the return: \$2,154.00.

Allowed: \$1,008.00.

Addition to net income: \$1,146.00.

Taxpayer claimed club expense which included dues and amounts paid on bills from the clubs. The amount allowed as a business expense is the club

dues of \$1,008.00. The remainder is disallowed as no business connection was shown by the taxpayer for these other amounts of \$1,146.00 paid to the clubs.

(f) Business promotion expense—138 No. June St.: \$9,493.62.

Claimed on the return: \$9,493.62.

Allowed: None.

Addition to net income: \$9,493.62.

These expenses of \$9,493.62 were found to consist of household operating expenses such as utilities, personal cleaning bills, vegetables, meat, groceries, butler's salary, plumbing and electrical bills for the house, flowers, and upkeep of the grounds around the house. The amount of \$9,493.62 is disallowed as being a personal family expense for which deduction is denied under section 24 (1) IRC. The amount is also disallowed as not being an ordinary and necessary business expense under section 23 (a) IRC.

(g) Travel: \$1,341.38.

Claimed on the return: \$3,500.00.

Allowed: \$2,158.62.

Added to net income: \$1,341.38.

The amount added to net income represents 1½ the cost (\$2,682.76) of a trip to Honolulu with taxpayers wife. Taxpayer and wife spent three weeks in Honolulu and failed to show that the trip was conducted for business purposes. The amount of \$1,341.38 is considered to be a personal family expense for which deduction is denied under section 24 (1) IRC.

(h) Accident and Health Premium: \$169.27.

Claimed on the return: \$169.27.

Allowed: None.

Addition to net income: \$169.27.

Taxpayer claimed as a miscellaneous deduction on Page 3 of the return \$169.27 expended for accident and health insurance premiums. This constitutes a medical expense. The amount expended does not exceed 5% of taxpayers adjusted gross income as provided in Section 23 (x) (1) IRC, which excess is deductible; therefore the amount of \$169.27 is returned to net income.

(i) Depreciation: \$3,000.00.

Claimed on the return: \$4,000.00.

Allowed: \$1,000.00.

Addition to net income: \$3,000.00.

Taxpayer claimed \$4,000.00 depreciation deduction on an automobile costing \$5,200.00 which taxpayer purchased in December 1948. The period used for depreciation was five years. Taxpayer was attempting to take depreciation allocable to four years in this year 1952 as he stated that he had not previously taken depreciation on the car. In previous years taxpayer had made an estimate of total automobile expense of \$1,500.00 per year. Section 23 (1)-5 (b) of the Regulations provides that a taxpayer is not permitted to take advantage in later years of his prior failure to take any depreciation allowance; therefore the amount of \$3,000.00 which represents depreciation allowance for previous years is hereby disallowed. (In this case it also presumed that the taxpayer's estimate of automobile expense in prior years included depreciation).

(j) Subscriptions and Periodicals: (\$14.56).

Claimed on the return: \$524.69.

Allowed: \$539.25.

Deduction from net income: (\$14.56).

Taxpayer submitted checks allocable to this expense amounting to \$539.25; therefore the excess of \$14.56 is allowed as an additional deduction from net income.

(k) Legal and accounting: (\$50.00).

Claimed on the return: \$1,800.00.

Allowed: \$1,850.00.

Deduction from net income: (\$50.00).

Taxpayer submitted checks allocable to this expense amounting to \$1,850.00; therefore the excess of \$50.00 is allowed as an additional deduction from net income.

(l) Office supplies and miscellaneous: (\$200.17).

Claimed on the return: \$1,677.92.

Allowed: \$1,878.09.

Deduction from net income: (\$200.17).

Taxpayer submitted checks allocable to this expense amounting to \$1,878.09; therefore the excess of \$200.17 is allowed as an additional deduction from net income.

(m) Postage: (\$2.00).

Claimed on the return: \$79.00.

Allowed: \$81.00.

Deduction from net income: (\$2.00).

Taxpayer submitted checks allocable to this expense amounting to \$81.00; therefore the excess of \$2.00 is allowed as an additional deduction from net income.

Schedule No. 2

Name of Taxpayer: Lyndol L. and Mildred W. Young.

Year ended: 12/31/52.

Computation of Income Tax for Individuals

Not Using Tax Table

Net income from Schedule No. 1: \$42,094.01.

Less: Exemption (2) \times \$600: \$1,200.00.

Income subject to tentative tax: \$40,894.01.

Income subject to tentative tax if separate return;
or one-half of such income if joint return: \$20,-
447.00.

Tentative tax: \$8,393.14.

Less: Adjustment for tax on partially tax-exempt
interest: —.

Balance of tentative tax: \$8,393.14.

Combined normal tax and surtax: \$8,393.14.

Multiply amount of combined tax by 2 if joint
return: \$16,786.28.

* * * * *

Balance of income tax liability: \$16,786.28.

Income tax liability disclosed by return: \$7,330.00.

Deficiency in income tax: \$9,456.28.

T. C. Memo. 1957-222

Tax Court of the United States

Lyndol L. Young and Mildred W. Young, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 57876. Filed Nov. 29, 1957

Francis J. McEntee, Esq., for the petitioners.

Eugene F. Reardon, Esq., for the respondent.

MEMORANDUM OPINION

Mulroney, Judge: The respondent determined a deficiency in income taxes due from petitioners for the calendar year 1952 in the amount of \$7,705.78. The sole issue in the case is whether petitioners are entitled to certain deductions, in addition to those allowed by the respondent, for club dues and expenses, travel expenses, business promotional expenses at petitioners' residence, and automobile depreciation. Other determinations of the respondent are not in issue and they may be reflected in the Rule 50 computation.

Petitioners, Lyndol L. Young and Mildred W. Young, are husband and wife, residing in Los Angeles, California. They filed their joint income tax return for the year 1952 with the district director of internal revenue, at Los Angeles, California. Lyndol L. Young, hereinafter referred to as petitioner, is a lawyer and in said income tax return he listed the following business deductions which are in question here:

Clubs: \$2,154.00.

Business promotional expense—138 North June Street: \$9,493.62.

Travel: \$3,500.00.

Depreciation: \$4,000.00.

The respondent allowed a portion of each item and the record here, consisting only of petitioner's testimony, is designed to establish that additional allowances should have been made. Since the question is purely one of fact, upon which petitioner had the burden of proof, we can discuss the evidence with respect to each item separately.

Clubs

Petitioner belonged to the Los Angeles Country Club, the Stock Exchange Club in downtown Los Angeles, and the Beach Club in Santa Monica. He claimed \$2,154 of club dues and expenses as business expenses for 1952. The Commissioner allowed \$1,008 and disallowed \$1,146. There was no evidence as to the use of the Beach Club for business. There was some evidence of a few business conferences at the Los Angeles Country Club and the Stock Exchange Club. The evidence consisted merely of petitioner's recollection of such conferences as no records were kept of such business conferences and no records of business expenditures at the clubs. Both petitioners frequently dined at the clubs (most every Sunday) and the clubs were used to some extent by both petitioners for social and personal purposes.

In view of the meager and unsatisfactory evidence of the use of the clubs for business purposes, re-

spondent's determination that an amount of \$1,008 should be allowed for club expenses was reasonable. We hold respondent was right in disallowing \$1,146 club expenses.

Business Promotional Expenses

The sums expended under this item, claimed to be \$9,493.62, were expenditures in connection with the operation of petitioners' personal residence at 138 North June Street, Los Angeles, California. The amount claimed seems to be an allocation of a portion of the total household expenses, consisting of expenditures for servants, groceries, utilities, and yard expense, and other such items. On this point we have only the general testimony of petitioner that he carried on a substantial portion of his law practice from his home. He had a downtown law office but he testified some clients came to his home during the year involved. The respondent allowed \$750 for this item.

Petitioner's main argument to establish this item is (1) his claim is reasonable in view of his gross income (\$61,000), and (2) that similar amounts had been allowed in previous years. There is nothing to his first argument as his burden was to show actual expenditures for a business purpose. His burden is not satisfied merely by testifying a substantial portion of his law business was carried on in his home and then allocating a certain sum from gross income as home business expense. As to the second argument, the law is clear that respondent is not bound by determinations of his agents for earlier years.

South Chester Tube Company, 14 T.C. 1229. See also H. L. McBride, 23 T.C. 901. In our opinion, petitioner failed to show anything beyond a minimal use of his home for business purposes and in view of the nature of the evidence presented, we believe that the respondent's allowance of \$750 for this item was reasonable. We hold he was right in disallowing the balance of the claimed deduction.

Travel Expenses

Petitioner claimed a deduction for travel expenses in the sum of \$3,500. Respondent allowed \$2,158.62. The vague and inconclusive evidence petitioner introduced would hardly support the allowance granted. It consists merely of statements by the petitioner that he spent the sums claimed on business trips. He mentioned a few trips such as a trip he said he made to Boston to confer with a client. His wife accompanied him and they visited their daughter in Newport, Rhode Island. He and his wife also journeyed to Hawaii where they stayed in a \$60 a day hotel room for three weeks. He testified "part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted". He claimed \$1,500 of the expenses of this trip as business travel expense. Respondent conceded that such a three week trip to Hawaii would cost \$1,500, but the proof that it was a business trip is insufficient. The rest of the evidence on this item is nothing more than a general statement of petitioner that the balance of the travel

expense is connected with "local matters, going to Arizona in 1952 * * * La Jolla, San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs."

The almost complete lack of evidence to support the claimed travel expenses means respondent's determination disallowing a deduction of \$1,341.38 for travel expenses is sustained.

Depreciation

Petitioner claimed a deduction for depreciation in the amount of \$4,000. This was for a Cadillac automobile which petitioner testified he used partly in his business. Respondent allowed \$1,000 for this item as a deduction for depreciation of the car in 1952. Petitioner's argument for the additional amount of \$3,000 is that he had used the car in his business for three years prior to 1952 and had claimed no deduction for depreciation of the car in those years. His deduction for depreciation for the car is at the rate of \$1,000 a year for four years.

Respondent was correct in disallowing any deduction for depreciation in prior years. The deduction for depreciation must be taken in the year in which it occurs and cannot be taken in later years by reason of a taxpayer's failure to deduct any depreciation allowance in prior years. *Whitelite Electric Co.*, 18 B.T.A. 934; *Motor Car Supply Co.*, 9 B.T.A. 556.

Decision will be entered under Rule 50.

Served and Entered December 13, 1957.

Tax Court of the United States
Washington

Docket No. 57876

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Court's Memorandum Opinion, filed November 29, 1957, the respondent filed a proposed computation of tax on February 11, 1958, and petitioners filed an acquiescence therein on April 3, 1958, Now, Therefore, it is

Ordered and Decided: That there is a deficiency in income tax in the amount of \$7,705.78 for the taxable year 1952.

[Seal] /s/ JOHN E. MULRONEY,
Judge

Entered April 7, 1958. Served April 8, 1958.

petitioners for the year 1952 was derived from his law practice.

II.

The controversy involves the proper determination of the petitioners' liability for Federal Income Taxes for the calendar year 1952.

1. In the year 1952 the total cost of the operation and maintenance of petitioners' home in Los Angeles was approximately \$20,000.00. Of this amount petitioner claimed the amount of \$5,846.43 as a business expense for the use of said home where he conducted the major part of his law practice. The evidence is undisputed that said home was used by petitioner for such purpose from January 1935, to January 1955, when petitioners sold said home. It was so used in the year 1952 and petitioner received from clients during said year for legal services rendered from said home the sum of approximately \$62,000.00. In petitioners' Income Tax Return for the years 1948, 1949, 1950 and 1951 this identical home expense for the identical premises involved was approved by the Commissioner of Internal Revenue after an audit and review of petitioners' returns for said years. In 1948 the Commissioner approved this expense in the sum of \$5,456.73; in the year 1949 the sum of \$4,747.76; in the year 1950 the sum of \$4,998.70, and in the year 1951 the sum of \$12,456.08, which included the same home expense and club dues and business cash expense, was likewise approved by the Commissioner. In 1952 the year which is in dispute in this pro-

ceeding, the Commissioner arbitrarily reduced the amount claimed by petitioners from \$5,846.43 to the sum of \$750.00.

2. In the year 1952 petitioner incurred total travel expense of \$7,500.00. Petitioner claimed \$3,500.00 of this amount as business expense directly connected with his law practice. Commissioner allowed only the sum of \$2,158.62. Petitioner made a trip to Honolulu in 1952 in connection with his law practice. He was accompanied by his wife. The total cost of the Honolulu trip was \$2,682.76. The Commissioner's examining officer or field agent allowed the sum of \$1,341.38 as business expense for the Honolulu trip but the entire amount of the Honolulu trip was disallowed by the Commissioner at the hearing before the Tax Court. Petitioner also incurred travel expense amounting to \$1,000.00 covering a trip to Boston, Massachusetts, to confer with petitioner's client The Liberty Mutual Insurance Company, and incurred further travel expense in the additional sum of \$1,000.00 covering various trips made by petitioner in connection with his law practice to Phoenix, Arizona, San Diego, La Jolla and Palm Springs.

3. In the year 1952 petitioner expended in cash disbursements in connection with his law practice in the form of checks payable to cash, and cashed by petitioner, the sum of \$3,150.00. Originally, petitioner claimed the sum of \$3,650.00, which was later reduced to said sum of \$3,150.00 in conference with Mr. Wolke of the Appellate Division. Mr. Wolke

representing the Commissioner approved the sum of \$2,000.00 of this expense on the basis of \$10.00 per day for 200 working days. The Commissioner disallowed the entire amount of \$3,150.00.

4. In the year 1952 petitioner claimed as business expense club dues and other club charges incurred by petitioner in the total sum of \$2,154.00 at the following clubs: Los Angeles Country Club, Stock Exchange Club, University Club and The Beach Club. The Commissioner allowed only the sum of \$1,008.00 covering dues paid by petitioner to said clubs and disallowed all expenses incurred by petitioner for the use of the facilities of said clubs.

5. In the year 1952 petitioner claimed depreciation on a Cadillac Automobile purchased by him in 1948, at a cost of \$5,200.00, for the years 1949, 1950, 1951 and 1952. The Commissioner allowed \$1,000.00 depreciation for the year 1952 and disallowed the sum of \$3,000.00 for prior years. Petitioner's auditor did not take depreciation on said automobile in petitioners' Income Tax Returns for the years 1949, 1950 and 1951 through inadvertence, which was not discovered by petitioner until 1953, at which time said auditor had left petitioner's employ and was in the employ of the United States Air Force in Europe.

III.

The Tax Court filed its Memorandum Opinion on November 29, 1957. No Findings of Fact or Conclusions of Law were filed by the Tax Court al-

though petitioner formally requested and submitted Findings of Fact in petitioners' favor.

IV.

The said taxpayers, being aggrieved by the Opinion of the Tax Court, and by its decision entered pursuant thereto, desire to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

FRANCIS J. McENTEE and
LYNDOL L. YOUNG,
/s/ By LYNDOL L. YOUNG,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 11, 1958.

[Title of Court of Appeals and Tax Docket No.
57876.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Chief Counsel, Internal Revenue Service,
Washington, D. C.

You are hereby notified that the petitioners on the 11th day of June, 1958, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a Petition for Review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above entitled cause. A

copy of the Petition for Review and the assignments of error as filed is hereto attached and served upon you.

Dated: Los Angeles, California, this 11th day of June, 1958.

Respectfully,

/s/ LYNDOL L. YOUNG and
FRANCIS J. McENTEE,
Counsel for Petitioners.

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed June 11, 1958.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to September 9, 1958.

Dated: Washington, D. C., July 7, 1958.

[Seal] /s/ J. E. MURDOCK,
Judge.

Served: July 9, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 15, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record", including Joint Exhibit 1-A, and Petitioners' Exhibit 2, admitted in evidence, (with the exception of the transcript of testimony, (document number 4 in this record), which was submitted to us as a copy of the original with the corrections made in accordance with granted joint motion, the said original having been returned by us to the reporter for correction and having been lost in transit; and also with the exception of the certificate (item 10 of the designation) upon which the record speaks for itself), in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket of my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of August, 1958.

[Seal] /s/ HOWARD P. LOCKE,

Clerk, Tax Court of the
United States.

[Endorsed]: No. 16177. United States Court of Appeals for the Ninth Circuit. Lyndol L. Young and Mildred W. Young, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: September 2, 1958.

Docketed: September 9, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16177

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Now come taxpayers Lyndol L. Young and Mildred W. Young, the petitioners herein, by their attorneys, Francis J. McEntee and Lyndol L. Young, and hereby assert the following errors, which they intend to urge on review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States in the above cause, entered on April 7, 1958:

1. The Tax Court erred in that it did not make any Findings of Fact on the issues involved in the above cause, either in the memorandum opinion of the Tax Court or independently thereof, although proposed Findings of Fact in favor of petitioners were expressly requested and submitted.

2. Any Findings of Fact claimed by respondent as being set forth in the memorandum opinion of the Tax Court are not supported by the evidence, and are clearly erroneous.

3. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in the year 1952 in the sum of \$5,846.43 as a business expense in connection with the partial maintenance of petitioners' residence where petitioner Lyndol L. Young conducted the major part of his law practice was reasonable and necessary.

4. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners claimed the sum of \$9,493.62 as a business deduction for the partial maintenance of petitioners' residence where petitioner Lyndol L. Young conducted the major part of his law practice. The amount claimed by petitioners for this expenditure was the sum of \$5,846.43.

5. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in the year 1952 in the sum of \$3,500.00 for busi-

ness travel expenses was reasonable, ordinary and necessary.

6. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in the year 1952 in the sum of \$2,154.00 for club business expense was reasonable, ordinary and necessary.

7. The Tax Court erred in that it entirely disregarded, and made no reference in its memorandum opinion to the claim of petitioners in the sum of \$3,150.00 as a business expense for cash disbursements made by the petitioner Lyndol L. Young in the year 1952 in connection with the maintenance of his law practice.

8. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sole contention of petitioner Lyndol L. Young to establish the claim of \$5,846.43 in connection with the partial maintenance of petitioners' residence where petitioner Lyndol L. Young conducted the major part of his law practice was that petitioner Lyndol L. Young's gross income from his law practice in the year 1952 was \$61,000.00.

9. The Tax Court erred in that it disregarded the uncontradicted testimony of petitioner Lyndol L. Young in support of the contentions and claims of petitioners covering the deductions made by petitioner Lyndol L. Young for business expenditures in the year 1952. The petitioner Lyndol L. Young was the only witness who testified before

the Tax Court. His testimony was uncontradicted and he was not otherwise impeached, and his testimony was not inherently improbable and, therefore, should not have been disregarded by the Tax Court, although said petitioner Lyndol L. Young is an interested party.

10. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$750.00 allowed by the respondent on taxpayers' claim of \$5,846.43 for partial maintenance of petitioners' residence where petitioner Lyndol L. Young conducted the major part of his law practice, was reasonable and that the respondent was right in disallowing the balance of said claimed deduction for the sum of \$5,846.43.

11. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$2,168.42 allowed by the respondent on petitioners' claim of \$3,500.00 for travel expenses for petitioner Lyndol L. Young connected with his law practice in the year 1952 was reasonable and that the respondent was right in disallowing the sum of \$1,341.38 of said claim for \$3,500.00.

12. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$1,008.00 allowed by the respondent on petitioners' claim of \$2,150.00 for business club expense was reasonable and that the respondent was right in disallowing the sum of \$1,146.00 of said claim for \$2,154.00.

13. The Tax Court erred in that it disregarded

the uncontradicted evidence that the respondent Commissioner in the years 1948, 1949 and 1950, after auditing the income tax returns, of petitioners for said years, approved and allowed as a business expense the partial maintenance of the residence of the petitioners at 138 North June Street where petitioner Lyndol L. Young conducted the major part of his law practice, the sum of \$5,456.73 in the year 1948, the sum of \$4,747.76 in the year 1949 and the sum of \$4,998.70 in the year 1950.

14. The Tax Court erred in that it disregarded the uncontradicted evidence of petitioners that the respondent Commissioner in the year 1951, after auditing the income tax returns of petitioners for said year, approved and allowed as a business expense the lump sum of \$12,456.08 for the same three claims involved in the above cause, to wit, the partial maintenance of the residence of the petitioners at 138 North June Street; the club expenses of petitioner Lyndol L. Young; the cash disbursements made by the petitioner Lyndol L. Young in connection with his law practice. The amount approved and allowed by the respondent Commissioner covering the above mentioned three claims of petitioners in the year 1951, to wit, the sum of \$12,456.08, is approximately the total amount of the same claims made by petitioners in the year 1952, and the ruling of the respondent Commissioner approving and allowing said identical claims which are now involved in the above cause for the respective years 1948, 1949, 1950 and 1951 are binding

on the respondent Commissioner for the year 1952 and subsequent years where the same claims have been asserted by the petitioners in approximately like amounts. Petitioners paid additional income tax assessments in the years 1948, 1949, 1950 and 1951 in reliance on the ruling of respondent Commissioner that said deductions which were so allowed and approved by respondent Commissioner in said years 1948, 1949, 1950 and 1951 could be claimed by petitioners in subsequent years, including the year 1952, and would be allowed and approved. The respondent Commissioner is estopped from changing his previous ruling for the years 1948, 1949, 1950 and 1951, and in applying in the year 1952 a different arbitrary ruling highly prejudicial to petitioners covering the same deductions in approximately the same amounts as in said previous years, on the sole specious ground that respondent Commissioner is not bound by the alleged determination of his agents for the previous years. The respondent Commissioner does not contend that said ruling for said previous years was based upon a mistake of law or fact, or that there was any misrepresentation by the petitioners.

FRANCIS J. McENTEE and
LYNDOL L. YOUNG,

/s/ By FRANCIS J. McENTEE,
Counsel for Petitioners.

Affidavit of Mailing attached.

[Endorsed]: Filed September 12, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

PETITIONERS' DESIGNATION OF THE RECORD MATERIAL TO THE REVIEW

The petitioners hereby designate the following portions of the record in the above cause, prepared, certified to and filed herein by the Clerk of the Tax Court as follows:

Petition, Document No. 2.

Answer, Document No. 3.

Official Report of Proceedings before the Tax Court at Los Angeles, California, June 5, 1957, Document No. 4.

Joint Motion to Correct Record—granted 8/14/57, Document No. 5.

Joint Exhibit 1-A and Petitioners' Exhibit No. 2, admitted in evidence, Document No. 6.

Petitioners' Brief, Document No. 7.

Report of F. Howard Morris, dated August 6, 1954, consisting of eight pages, Document No. 8.

Memorandum Reply Brief of Commissioner of Internal Revenue, Document No. 9.

Memorandum Opinion filed November 29, 1957, Document No. 10.

Decision, Document No. 11.

Petition for Review, Document No. 12.

Proof of Service of Petition for Review, Document No. 13.

Designation of Contents of Record on Review with Proof of Service thereon, Document No. 14.

Order Enlarging Time, Document No. 15.

Statement of Points.

Petitioners' Designation of the Record Material
to the Review.

FRANCIS J. McENTEE and
LYNDOL L. YOUNG,
/s/ By FRANCIS J. McENTEE,
Counsel for Petitioners.

Certificate of Mailing attached.

[Endorsed]: Filed September 12, 1958. Paul P.
O'Brien, Clerk.

No. 16177

United States
Court of Appeals
for the Ninth Circuit

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SUPPLEMENTAL
Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FIL

DEC 17

PAUL P. O'BR



No. 16177

United States
Court of Appeals
for the Ninth Circuit

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SUPPLEMENTAL
Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

The Tax Court of the United States

Docket No. 57876

LYNDOL L. YOUNG and MILDRED W.
YOUNG, Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

EXCERPT FROM PETITIONERS' BRIEF

* * * * *

Petitioners' Request for Findings of Fact

1. Petitioners Lyndol L. Young and Mildred W. Young, husband and wife, and hereinafter referred to as Petitioner, Lyndol L. Young, are residents of Los Angeles County, California.

2. Petitioner was admitted to the California Bar in 1916, and to the Bar of the United States Supreme Court in 1921. Petitioner served as Assistant United States Attorney and Special Assistant United States Attorney in the years 1918 and 1919. Thereafter Petitioner practiced law in Los Angeles until 1928 when Petitioner withdrew from the law practice. From 1928 to 1934 Petitioner was connected with several large corporations as an officer and director, including Aviation Corporation, American Airways and other affiliated and wholly controlled corporations. From 1931 to 1934 Petitioner was located in New York and other eastern cities in connection with his corporation positions. In 1934

Petitioner resigned his corporate offices and returned to Los Angeles. In 1935 Petitioner resumed the practice of law in Los Angeles. (Tr. 6, 7, 8.)

3. From 1935 to 1955 Petitioner maintained an office in downtown Los Angeles but conducted the substantial part of his law practice from his home at 138 North June Street, which Petitioner sold in January, 1955. (Tr. 8, 9.)

4. In 1935 Petitioner was consulted by Mrs. Tierney, a client of many years, with reference to legal matters. These consultations took place at 138 North June Street, and were continuous until 1938 when Mrs. Tierney died. At no time did Mrs. Tierney consult Petitioner in his downtown law office, and she was never in said office at any time. Upon the demise of Mrs. Tierney Petitioner became Executor and Trustee of her estate, which was appraised at approximately \$900,000.00. Petitioner also became guardian of the estates and persons of the three minor children of Mrs. Tierney. The substantial services of Petitioner as such Executor, Trustee, guardian and attorney were rendered at 138 North June Street. Petitioner purchased a home for said minor children within a short distance from his home and said children consulted and conferred with Petitioner at his home on numerous occasions during the time Petitioner occupied said premises, to wit, to 1955. (Tr. 9, 10.)

5. Mrs. Katherine C. Iten, the mother of Mrs. Tierney, was also a client of Petitioner's and conferred with Petitioner at 138 North June Street

from 1935 to 1943, when Mrs. Iten died. Mrs. Iten never conferred with Petitioner at his downtown office. Upon the death of Mrs. Iten Petitioner became Executor and Trustee of her Will, and the substantial services of Petitioner in said estate were performed by Petitioner at 138 North June Street. (Tr. 10, 11.)

6. Petitioner received substantial benefits from Mrs. Tierney and her estate during the period 1935 to 1955, from services performed by him amounting to approximately \$232,000.00. In 1952 Petitioner received from said client the sum of \$12,000.00. (Tr. 10, 11.)

7. Petitioner received substantial benefits from Mrs. Iten and her estate from 1935 to 1955 for services performed by him at 138 North June Street amounting to approximately \$150,000.00. In 1952 Petitioner received from said client the sum of \$17,676.00. (Tr. 10, 11.)

8. In 1934 P. H. Titus, vice president and general manager of the Liberty Mutual Insurance Company, who resided in Boston, Massachusetts, conferred with Petitioner at 138 North June Street with reference to the employment of Petitioner by said Insurance Company as its attorney in Los Angeles. Thereafter Mr. Titus on trips to Los Angeles conferred with Petitioner in said home about the legal business Petitioner was handling for said company. Mr. Titus never conferred with Petitioner in his downtown office at any time. Various other officers and representatives of said Insurance Com-

pany from Boston and San Francisco and Los Angeles conferred about the legal business of said Insurance Company with Petitioner in said home during said period of 1935 to 1955. The bulk of the legal business handled by Petitioner for said Insurance Company consisted of the trial of cases pending in the Federal and State Courts. The substantial services rendered by Petitioner in the preparation of said cases for trial were performed by Petitioner in his home. The said preparation work consisted principally of reviewing the files of the claims department in pending cases and in preparing briefs on appeal in cases that were appealed after trial. Petitioner received substantial benefits from said client during said period amounting to approximately \$175,000.00. In 1952 Petitioner received from said client the sum of \$5,200.00. (Tr. 13, 14, 15, 16, 17.)

9. Other clients of Petitioner who conferred with him at said home during said period 1935 to 1955 were Mr. and Mrs. J. E. Thompson of Phoenix, Arizona, their nieces Mrs. Gertrude Lytton-Smith and Mrs. Ann Filor Day. Substantial fees were received from said clients. In 1952 Petitioner received a fee of \$25,000.00 from Mrs. Lytton-Smith and Mrs. Day. Mr. and Mrs. Thompson and Mrs. Lytton-Smith and Mrs. Day conferred with Petitioner in said home with reference to their legal matters up to the time said home was sold in January 1955. (Tr. 11, 12, 13.)

10. R. W. Fewel, a client of Petitioner, con-

ferred with Petitioner in said home from 1947 to 1955 with reference to the legal matters of Mr. Fewel. During said period Petitioner was paid the sum of \$62,000.00 by Mr. Fewel. In 1952 Mr. Fewel conferred with Petitioner on numerous occasions at Petitioner's home with reference to the estate of Margaret S. Bullock. For said services Petitioner was paid a fee of \$12,000.00 by Mr. Fewel, which was received subsequent to 1952 but is included in the total fee of \$62,000.00. (Tr. 17, 18, 19, 20.)

11. The utilization by Petitioner of said home at 138 North June Street in connection with his law practice was an ordinary and necessary business expense and Petitioner was entitled to a deduction on his income tax return for said expenses incurred during the year 1952. (Tr. 17.)

12. That the identical expense for the maintenance and operation of said home at 138 North June Street was claimed by Petitioner in the years 1948, 1949, 1950 and 1951. The income tax returns of Petitioner for said years were reviewed and audited by the office of the Respondent Commissioner and Petitioners' claims for such business expense during said years was approved by the Commissioner in the following amounts: For the year 1948, \$5,456.73; for the year 1949, \$4,747.76; for the year 1950, \$4,998.70. In 1951 Petitioner claimed a total business deduction of \$12,456.08 which included the expense for the operation and maintenance of Petitioners' home, the Petitioner's club expense and Petitioner's cash disbursements for

business purposes. This return was reviewed and audited by the Respondent Commissioner and in October, 1952, an additional assessment was made against Petitioner on his 1951 income in the sum of \$1,455.78, which was paid by Petitioner on October 9, 1952. (Petitioners' Exhibit A.) That the gross income of Petitioner for the year 1952 was \$62,000.00, and Petitioner claimed the sum of \$5,846.43 as a business expense connected with the operation and maintenance of his home. (Tr. 21, 22, Ex. B, Petition.)

13. In 1948 Petitioner's gross income was \$35,000.00 and, as above indicated, Petitioner was allowed a deduction of \$5,456.73 for the identical expense covering the operation and maintenance of said home. Petitioner's income for 1949 was \$40,000.00; for 1950 it was \$39,000.00 and for 1951 it was \$50,000.00. (Ex. B. Petition, Tr. 22.)

14. That the total cost to Petitioner for the maintenance and operation of the premises at 138 North June Street for the year 1952 was approximately \$20,000.00. (Tr. 34.)

15. That the amount claimed by Petitioner, to wit, \$5,846.43 in his 1952 income tax return for the ordinary and necessary expenses connected with the use by Petitioner for business purposes of the premises at 138 North June Street was reasonable and was incurred by Petitioner in conducting his law practice from said premises. That the sum of \$750.00 allowed by Respondent to cover said expenses is arbitrary and unreasonable under the circumstances disclosed by the evidence. The evidence shows con-

clusively that Petitioner in the year 1952 and prior thereto and thereafter until 1955 conducted a substantial part of his law practice from said premises and received substantial benefits by way of fees as a result thereof. (Tr. 6-22, inc.)

16. The claim of \$9,423.62 listed in Petitioner's 1952 income tax return under the title "Business Promotional Expense, 138 North June Street" consists of the sum of \$5,843.62 for the business expense connected with the maintenance and operation of Petitioners' home, and the sum of \$3,650.00 consisting of cash disbursements represented by checks payable to cash, the proceeds of which were disbursed by Petitioner in connection with his law practice. At the hearing before Mr. Wulke of the Appellate Division, the figure of \$3,650.00 was reduced by agreement between Petitioner and Mr. Wulke to \$3,150.00. Mr. Wulke as the agent of the Respondent Commissioner on December 8, 1955, in conference with Petitioner approved the allowance of the sum of \$2,000.00 of this claim for business cash disbursements. (Ex. A, B, Petition, Tr. 25, 26, 38, Respondent's Findings 17, 18.)

17. That the representatives of the Respondent Commissioner examined and verified all of the Petitioner's checks making up said total of \$3,650.00. (Tr. 33, 38.)

18. That the computation of the Commissioner's representative Mr. Wulke allowing Petitioner \$2,000.00 on said claim of \$3,150.00 was based on \$10.00 per day for a period of 200 working days as being a reasonable cash disbursement expense for

Petitioner to make in connection with his law practice. (Petition Exs. A, B.)

19. That the sum of \$3,150.00 claimed by Petitioner was an ordinary and necessary business expense and the amount thereof is reasonable and was incurred by Petitioner in connection with the maintenance of his law practice. (Petition Exs. A, B, Tr. 38.)

20. Petitioner claimed the sum of \$2,154.00 for club expense. Respondent Commissioner's representative examined all of the checks and the club bills of Petitioner and verified this amount. There is no dispute about the correctness of the amount. (Tr. 25, 26, 33, 38.)

21. The Commissioner's representative allowed only the sum of \$1,008.00 of this claim which covered only the dues paid by Petitioner to his various clubs. The sum of \$1,146.00 is the amount of the Petitioner's expenses at his clubs in addition to said dues. The Petitioner used his various clubs for the purpose of consulting with his clients during the year of 1952 and many years prior thereto and also thereafter. That in 1952 Petitioner conferred with Mrs. J. E. Thompson at the Los Angeles Country Club; Mr. R. W. Fewel, Mr. Litchfield of the Liberty Mutual Insurance Company, all of whom paid Petitioner substantial fees over a period of many years including the year 1952. Petitioner also conferred with clients at the Stock Exchange Club during the year 1952 who paid Petitioner substantial fees. During the year 1956 Petitioner and Mr. McEntee conferred with one client at the Los Ange-

les Country Club who has paid them so far the sum of \$84,000.00 for their services as attorneys. That the Petitioner's clubs consist of the Los Angeles Country Club, The Beach Club, Stock Exchange Club, University Club, and they have been used continuously by Petitioner, including the year 1952, in connection with his law practice, and the expense of his clubs is an ordinary and reasonable business expense for Petitioner to incur in connection with his law practice. (Tr. 13, 15, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32.)

22. Petitioner claimed the sum of \$3,500.00 as a business deduction for travel expense during the year 1952. (Ex. 1-A, Tr. 23, 24.)

23. Petitioner spent the total sum of \$7,500.00 for travel expenses during the year 1952. Petitioner's checks and records covering this expense were examined and verified by Respondent's representatives. (Tr. 24.)

24. The Commissioner's representatives allowed the sum of \$2,158.62 for travel expense and disallowed the sum of \$1,341.38. The sum disallowed by the Commissioner's representative is based upon his addition to Petitioner's net income of \$1,341.38, which was one-half of the cost of Petitioner's total travel expenses to Honolulu. (Ex. A, Petition.) At the hearing in this proceeding Petitioner testified that out of the total sum of \$3,500.00 he claimed the sum of \$1,500.00 to cover the Honolulu trip. The Respondent Commissioner through his representative Mr. Moore allowed one-half of the total cost of this trip as business expense. (Tr. 26.)

At the trial the Court inquired of the Government as follows:

“Does the Government contest the amount of that trip (Honolulu) as \$1,500.00 for a trip to Hawaii and staying three weeks.

“Mr. Reardon: No, your Honor.” (Tr. 23, 24.)

In view of the position of the Government at the trial and the agent's determination the claim of Petitioner for \$1,500.00 to cover travel expense to Honolulu is approved and is no longer an issue in the case.

25. The Petitioner made a trip to Boston, Massachusetts in 1952 and consulted with representatives of the Liberty Mutual Insurance Company, a client of Petitioner, with reference to the legal business of said Insurance Company which was handled by Petitioner in California. This client over the years paid Petitioner the sum of \$175,000.00, and in 1952 paid Petitioner \$5,200.00. The sum of \$1,000.00 claimed by Petitioner to cover travel expense to Boston was ordinary, necessary and reasonable. (Tr. 24.)

26. Petitioner conferred with clients in Arizona in 1952; also in La Jolla and San Diego and conducted further trips outside of Los Angeles in connection with his law practice. Petitioner claimed the sum of \$1,000.00 to cover the travel expense of all of said trips. Petitioner received substantial fees as a result of said trips during the year 1952. The sum of \$3,500.00 to cover travel expense out of the total sum of \$7,500.00 paid out by Petitioner during the

year 1952 was a fair amount to be allocated by Petitioner for business expense. Said sum of \$3,500.00 incurred by Petitioner for travel expense in 1952 was ordinary, necessary and reasonable and was incurred by Petitioner in connection with his law practice. (Tr. 24.)

27. In December, 1948, Petitioner purchased a 1949 Cadillac automobile at a cost of \$5,200.00 which Petitioner used in business exclusively. (Tr. 24, 25.)

28. Petitioner's accountant through inadvertance omitted to claim a deduction for depreciation on said automobile in the years 1949, 1950 and 1951. Said accountant left Petitioner's employ in 1952. Petitioner in March, 1953, in the course of the preparation of his income tax return for 1952 discovered said omission by said accountant, and consequently claimed in his 1952 return depreciation at the rate of \$1,000.00 per year for each of said omitted years, a total of \$3,000.00. The Commissioner allowed the depreciation deduction for 1952 in the sum of \$1,000.00 but disallowed the deduction for prior years in the sum of \$3,000.00. Inasmuch as the sole reason for omitting the claim for a deduction for depreciation on said automobile for the years 1949, 1950 and 1951 was the inadvertance of Petitioner's accountant the Petitioner was entitled to take a deduction for depreciation on said automobile for said omitted years in his 1952 return. (Tr. 24, 25.)

* * * * *

[Endorsed]: T.C.U.S. Filed September 19, 1957.

No. 16177

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LYNDOL L. YOUNG and MILDRED W. YOUNG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the
United States.

PETITIONERS' BRIEF.

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FILED

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition to Review a Decision of the Tax Court of the
United States.

PETITIONERS' BRIEF.

Statement Re Jurisdiction.

This Court has jurisdiction to hear and determine the petition of Lyndol L. Young and Mildred W. Young to review the decision of the Tax Court of the United States. The Decision of the Tax Court was entered April 7, 1958 [Tr. p. 79], following the Memorandum Opinion of the Tax Court entered December 13, 1957 [Tr. pp. 74-78].

The Petition for Review was filed June 11, 1958 [Tr. pp. 80-84].

Statement of the Case.

On March 9, 1955, the Commissioner of Internal Revenue determined a deficiency in petitioners' income taxes for the year ending December 31, 1952, of \$7,705.78 [Tr.

pp. 9-12]. Petitioners had declared and paid the sum of \$7,330.00 for the taxable year 1952 [Tr. pp. 59-62], and an additional sum of \$739.80 on February 8, 1955; total tax paid for 1952—\$8,069.80 [Tr. p. 59].

The above mentioned deficiency notice dated March 9, 1955, followed a hearing before the Appellate Division of the Internal Revenue Service between petitioner Lyndol L. Young and Messrs. Wulke and Graham, representatives of the Commissioner [Tr. pp. 12-15].

On May 19, 1955, following said deficiency notice the petitioners filed their petition with the Tax Court of the United States for a re-determination of the deficiency set forth by the respondent Commissioner in his notice of deficiency dated March 9, 1955 [Tr. pp. 3-15]. The respondent Commissioner filed his Answer thereto June 28, 1955 [Tr. pp. 16-17].

The hearing before the Tax Court took place on June 5, 1957, in Los Angeles, California, and was presided over by the Honorable John E. Mulroney, Judge of the Tax Court.

The proceedings before the Tax Court are set forth in the Transcript of Record at pages 17 to 58, inclusive. The hearing commenced at 11 o'clock A.M. and was concluded at 12:30 o'clock P.M. The Reporter's Transcript of the hearing was so garbled and confused by the reporter that it became necessary to correct the record by joint motion of the petitioners and respondent [Tr. pp. 53-58]. Notwithstanding the corrections that were made the transcript of the hearing still does not show all of the facts connected with the contentions of the petitioners concerning the item of business expenses which were taken as deductions by petitioners in their 1952 income tax return. Furthermore,

the Judge of the Tax Court at the hearing restricted the petitioner, Lyndol L. Young, who was the only witness who testified at the hearing, from stating in detail the many matters which he attended to for his clients in both his home and his clubs, in the following language:

“The Court: Do we have to go into all the issues, here? All this litigation could be endless, I’m sure. All I’m interested in is how his home was used, and the Club was used, for these things, without telling us so much of the issues of these cases.

The Witness: I think it would be better. I don’t want to go into too much detail, yet I want to bring out the facts that these were essential matters.

The Court: I will give you the utmost latitude in establishing your use of your home and your Club for business.” [Tr. p. 34.]

Following this admonition from the Court petitioner did not go into the detail of many matters involved in the issues concerning petitioners’ deductions for business expenses.

The opinion of Judge Mulroney also, contrary to the record, refers to the testimony of petitioner Lyndol L. Young as failing to show anything beyond the minimal use of his home for business purposes and that the evidence concerning the use by petitioner of his clubs for business purposes was meager and unsatisfactory, and that the testimony of petitioner regarding his travel expense in the claimed amount of \$3,500.00 was based upon almost complete lack of evidence [Tr. pp. 74-78].

No Findings were made by Judge Mulroney either in his Memorandum Opinion or independently thereof although Findings were requested and submitted by petitioners [Sup. Tr. pp. 95-105].

The questions involved in this Petition for Review are:

1. The respondent Commissioner, after auditing the income tax returns of petitioners for the years 1948, 1949, 1950 and 1951, expressly approved the deductions made by petitioners in said years as a business expense of a portion of the maintenance and operating cost of petitioners' residence, where petitioner Lyndol L. Young conducted the major and substantial part of his law practice. The amount covering this deduction approved by the respondent Commissioner in the above mentioned years is as follows: 1948 the sum of \$5,456.73; 1949 the sum of \$4,747.76; 1950 the sum of \$4,998.70 [Tr. pp. 35-36]. In the year 1951, after an audit of the income tax return of petitioners for said year, the respondent Commissioner approved the deduction as a business expense of the lump sum of \$12,456.08, which included a portion of the maintenance and operation of the petitioners' home, which is the same home that is involved in the 1952 return, and club expenses and business cash disbursements [Tr. p. 36]. The same items of business expense for the year 1952 totalled the sum of \$11,147.62, broken down as follows: The sum of \$5,843.62 as a portion of the maintenance and operation expense of petitioners' home; the sum of \$2,154.00 Club expenses; the sum of \$3,150.00 for business cash disbursements; total \$11,147.62 [Tr. p. 19].

Petitioners' gross income, which was received solely from the law practice of petitioner Lyndol L. Young, in the years involved from 1948 to 1951 was as follows: 1948, \$35,000.00; 1949, \$40,000.00; 1950, \$39,650.00 [Tr. p. 14]; 1951, \$50,000.00 [Tr. p. 36]. Petitioners' income for the year 1952, received solely from the law practice of petitioner Lyndol L. Young, was \$62,000.00. It is, therefore, conclusive from the record in this case,

as well as the conduct of the respondent Commissioner in approving the same deductions for business expense in prior years in approximately the same amounts as claimed in the year 1952 is a definite ruling by the respondent Commissioner that the deductions claimed by petitioners in 1952 for their home expense, club expense and business cash disbursements are reasonable, ordinary and necessary. It is, therefore, obvious that the action of the respondent Commissioner in refusing to approve said business deductions in the amounts claimed for the year 1952 is arbitrary and contrary to his former ruling. For the same reason the Memorandum Opinion and Decision of the Tax Court of the United States is not supported by the evidence or the law. This statement is further supported by the fact that no Findings of Fact were made by the Tax Court.

2. Club expenses claimed by petitioner in the year 1952 amounted to the sum of \$2,154.00. The respondent Commissioner reduced this sum to \$1,008.00, which amount of money represented only the Club dues paid by petitioner, and disallowed the sum of \$1,146.00 as business expense incurred by petitioner Lyndol L. Young at his clubs in connection with his law practice [Tr. pp. 5, 11, 19, 42, 69, 70].

3. Cash disbursement claimed by petitioners in 1952 were originally claimed in the sum of \$3,650.00, but by agreement between Mr. Wulke of the Appellate Division of the Internal Revenue Service and petitioner Lyndol L. Young this amount was reduced to \$3,150.00, of which amount Mr. Wulke approved the allowance of the sum of \$2,000.00 [Tr. p. 13]. Notwithstanding the fact that Mr. Wulke as the representative of the respondent Commissioner approved the sum of \$2,000.00 as reasonable for this cash disbursement business expense [Tr. p. 13],

the statement of deficiency of the respondent Commissioner disallows this claimed expense in its entirety [Tr. p. 11].

4. Travel expense claimed directly connected with the law practice of petitioner Lyndol L. Young amounted to \$3,500.00. The uncontradicted testimony of said petitioner, as well as the records of said petitioner examined by the representatives of the respondent Commissioner, show that the total travel expense for said year 1952 incurred by petitioners was \$7,500.00, and that petitioners only claimed the sum of \$3,500.00 to cover travel expense connected with petitioner's law practice. The respondent Commissioner reduced said claim for travel expense from \$3,500.00 to \$2,158.62 [Tr. pp. 4, 11, 19, 37-38].

Specification of Errors.

1. The Tax Court erred in that it did not make any Findings of Fact, either in the Memorandum Opinion of the Tax Court or independently thereof, although proposed Findings of Fact in favor of petitioners were expressly requested and submitted [Sup. Tr. pp. 95-105].

2. Any Findings of Fact claimed by respondent Commissioner as being set forth in the Memorandum Opinion of the Tax Court are not supported by the evidence, and are clearly erroneous.

3. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in the year 1952 in the sum of \$5,843.62 as a business expense in connection with the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice, was reasonable, ordinary and necessary.

4. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners claimed the sum of \$9,493.62 as a business deduction for the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice. The amount claimed by petitioner for this expense was the sum of \$5,843.62.

5. The Court erred in that it decided, contrary to the uncontradicted evidence, that petitioners did not sustain their burden to show that the expenditures made by the petitioner in the year 1952 in the sum of \$3,500.00 for business travel expense was reasonable, ordinary and necessary.

6. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the petitioners did not sustain their burden to show that the expenditures made by petitioner Lyndol L. Young in 1952 in the sum of \$2,154.00 for Club business expense was reasonable, ordinary and necessary.

7. The Tax Court erred in that it entirely disregarded and made no reference in its Memorandum Opinion to the claim of petitioners in the sum of \$3,150.00 as a business expense for cash disbursements made by the petitioner Lyndol L. Young in the year 1952 in connection with the maintenance of his law practice, although it appeared from the record that Mr. Wolke a representative of the Appellate Division of the respondent Commissioner approved the sum of \$2,000.00 as reasonable for this expenditure.

8. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sole contention of petitioner Lyndol L. Young to establish the claim of \$5,843.62 in connection with the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young

conducted the major part of his law practice, was that petitioner Lyndol L. Young's gross income in the year 1952 was \$61,000.00.

9. The Tax Court erred in that it disregarded the uncontradicted testimony of Lyndol L. Young in support of the contentions and claims of petitioners covering the deductions made by petitioner Lyndol L. Young for business expenditures in the year 1952. The petitioner Lyndol L. Young was the only witness who testified before the Tax Court. His testimony was uncontradicted and he was not otherwise impeached, and his testimony was not inherently improbable, and, therefore, should not have been disregarded by the Tax Court, although petitioner Lyndol L. Young is an interested party.

10. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$750.00 allowed by the respondent Commissioner on taxpayers' claim of \$5,843.62 for the partial maintenance of petitioners' residence, where petitioner Lyndol L. Young conducted the major part of his law practice, was reasonable and that the respondent Commissioner was right in disallowing the balance of said claim in the sum of \$5,093.62.

11. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$2,168.42 allowed by respondent Commissioner on petitioners' claim for \$3,500.00 for travel expenses incurred by petitioner Lyndol L. Young which were connected with his law practice in the year 1952 was reasonable, and that the respondent Commissioner was right in disallowing the sum of \$1,341.38 of said claim of \$3,500.00.

12. The Tax Court erred in that it decided, contrary to the uncontradicted evidence, that the sum of \$1,008.00

allowed by the respondent Commissioner on petitioners' claim for \$2,154.00 for business Club expenses was reasonable, and that the respondent Commissioner was right in disallowing the sum of \$1,146.00 of said claim for \$2,154.00.

13. The Tax Court erred in that it disregarded the uncontradicted evidence that the respondent Commissioner in the years 1948, 1949 and 1950, after auditing the income tax return of petitioners for said years, approved and allowed as a business expense the partial maintenance of the residence of the petitioners at 138 North June Street, where petitioner Lyndol L. Young conducted the major part of his law practice, the sum of \$5,456.73 in the year 1948; the sum of \$4,747.76 in the year 1949; the sum of \$4,998.70 in the year 1950.

14. The Tax Court erred in that it disregarded the uncontradicted evidence of petitioners that respondent Commissioner in the year 1951, after auditing the income tax return of petitioners for said year, approved and allowed as a business expense the lump sum of \$12,456.08 for the same three claims involved in the year 1952, to wit, the partial maintenance of the residence of the petitioners at 138 North June Street, the Club expenses of petitioner Lyndol L. Young, the cash disbursements made by petitioner Lyndol L. Young in connection with his law practice. The amount approved and allowed by the respondent Commissioner covering the above mentioned three claims for the year 1951, to wit, the sum of \$12,456.08, exceeds the amount claimed by petitioners in their 1952 return for the identical three business expense claims by the sum of \$2,308.46, and the ruling of the respondent Commissioner approving said identical claims which are involved in the 1952 return of petitioners for the respective years 1948,

1949, 1950 and 1951, are binding on the respondent Commissioner for the year 1952 and subsequent years where the same claims have been asserted by the petitioners in approximate like amounts. Petitioner paid additional income tax assessments in the years 1948, 1949, 1950 and 1951 in reliance on the ruling of respondent Commissioner that said deductions which were so allowed and approved in the years 1948, 1949, 1950 and 1951 could be claimed by petitioners in subsequent years, including the year 1952, and would be allowed and approved. The respondent Commissioner is estopped from changing his previous ruling for the years 1948, 1949, 1950 and 1951, and in applying in the year 1952 a different arbitrary ruling highly prejudicial to petitioners covering the same deductions in approximately the same amounts as in said previous years on the sole specious ground that the Commissioner is not bound by the alleged determination of his agents for the previous years. The respondent Commissioner does not contend that his said ruling for said previous years was based upon a mistake of law or fact or that there was any misrepresentation by the petitioners.

Argument of the Facts.

As hereinabove mentioned the Tax Court did not make any Findings of Fact either in the Memorandum Opinion of Judge Mulroney or independently thereof, although Findings of Fact were expressly requested and submitted by the petitioners. The Memorandum Opinion likewise is not supported by the evidence in the following essential particulars, to wit: The Memorandum Opinion states with reference to the Club expense of petitioner Lyndol L. Young, amounting to \$2,154.00, as follows:

“In view of the meager and unsatisfactory evidence of the use of clubs for business purposes respondent’s

determination that an amount of \$1,008.00 should be allowed for club expenses was reasonable. We hold respondent was right in disallowing \$1,146.00 club expenses" [Tr. pp. 75, 76].

The undisputed evidence is that no portion of the club expenses incurred by petitioner Lyndol L. Young in 1952 was allowed, and that the sum of \$1,008.00 represented only the club dues paid by said petitioner [Tr. pp. 11, 19, 42, 60, 75]. However, the uncontradicted testimony of petitioner Lyndol L. Young presents a very different picture and shows without dispute that over a period of many years, and including the year 1952, the petitioner Lyndol L. Young used his clubs almost exclusively for business purposes [Tr. pp. 17-58, incl.].

Under the title of "Business Promotional Expenses" the Memorandum Opinion of the Tax Court states as follows:

"In our opinion, petitioner failed to show anything beyond a minimal use of his home for business purposes and in view of the nature of the evidence presented we believe that the respondent's allowance of \$750.00 for this item was reasonable. We hold he was right in disallowing the balance of the claimed deduction" [Tr. p. 77].

The testimony of the petitioner Lyndol L. Young completely refutes the foregoing statement. To summarize his uncontradicted testimony, it appears from the Transcript of Record, pages 20-58 thereof, inclusive, that said petitioners purchased their home in 1927 at a cost of \$70,000.00 and that when the respondent Commissioner arbitrarily refused to follow his previous ruling, and disallowed the reasonable portion of the maintenance of said home as a business expense, the petitioners sold said home for \$40,000.00 and suffered a loss of \$30,000.00. Said

petitioner further testified that upon resuming his law practice in 1936 said home was used continuously by him as an office directly connected with his law practice. He further spelled out the names of his clients who consulted him in said home over the period from 1936 to and including January 1955 when said home was sold. The clients named by said petitioner were Mrs. Katherine C. Iten and her daughter Mrs. Tierney, and with reference to these two particular clients the witness testified that they never at any time consulted said petitioner in his downtown office, and that he was continuously consulted by them during their lifetime in said home. Mrs. Tierney died in 1938 and Mrs. Iten died in 1943. Said petitioner was the co-executor and co-trustee of the Tierney Estate and Executor and Trustee of the Iten Estate. Said petitioner further testified that after Mrs. Tierney died he was appointed Testamentary Guardian of her children as to both their persons and estates, and that said children constantly came to the home of said petitioner and that the substantial and major legal and fiduciary services performed by said petitioner in connection with said estates were transacted in said home, and that from 1936 to the date of the hearing before the Tax Court, to wit, June 5, 1957, the petitioner had received from Mrs. Tierney and her estate the sum of \$232,000.00 as fees and that he received during the same time from Mrs. Iten and her estate the sum of \$150,000.00, and that in the year 1952 he received from the Iten Estate for his services a fee of \$17,676.00, and from the Tierney Estate as fees in the year 1952 the sum of \$12,000.00 [Tr. pp. 20-25].

Said petitioner further testified that in the year 1952 the Filor sisters, who resided in Arizona and who were clients of said petitioner and who consulted him in his

said home, paid said petitioner the sum of \$25,000.00 [Tr. pp. 25-27]. (See, *Ann Filor Day, et al. v. United States*, C. C. H. U. S. Tax Cases, 57-1, Pars. 9269-9273.) Said petitioner further testified that the major and substantial legal services performed by him for his client Liberty Mutual Insurance Company for the period 1936 to and including the year 1954 were in said home. That he was consulted in said home by Mr. P. E. Titus, vice president and general manager of the Claims Department of Liberty Mutual Insurance Company; by Mr. P. H. Wilson, vice president of said company in San Francisco; Mr. Walker, regional Claims Manager; and Mr. Litchfield, who succeeded Mr. Walker as said regional Claims Manager in San Francisco, and that during said period he was paid the sum of \$175,000.00 by Liberty Mutual Insurance Company for his legal services, which were substantially performed in said home. That in the year 1952 Liberty Mutual Insurance Company paid said petitioner the sum of \$5,200.00 [Tr. pp. 28-32].

Said petitioner also referred to Mr. Richard W. Fewel as a client who consulted with petitioner in said home during the period from 1946 to 1952, and that he was paid by Mr. Fewel for said services a total sum of \$62,000.00, which included the sum of \$25,000.00 for services rendered to Mr. Fewel as Guardian for Linley Wood. Said petitioner further testified that he was consulted by Mr. Fewel not only in his home but also at his clubs [Tr. pp. 32-34].

The petitioners take the position that not only did petitioner Lyndol L. Young use his said home and clubs for business purposes in the year 1952, but that said home and clubs were used over a considerable period of time, including the year 1952, and that the same had to be avail-

able in order to be used by petitioner Lyndol L. Young in connection with his law practice and represented substantial investments by petitioners. It is therefore, obvious that the year 1952 is not the sole criterion upon which to base the business use of said home and said clubs, and, further, that the legal services rendered by petitioner in said home and said clubs to his clients in one particular year in all probability would not be paid for until subsequent years. Therefore, it is proper to consider the period of time involved when said petitioner used said home for business purposes, to wit, from the year 1936 to 1955, during which period the record shows petitioner received for his said legal services rendered in said home and said clubs a substantial sum of money from his clients.

Insofar as the Los Angeles Country Club is concerned, said petitioner testified that in the year 1956 the use of said club was solely responsible for the attorney-client relationship between petitioner Lyndol L. Young and his associate Francis J. McEntee and the Price Estate. Furthermore, that numerous meetings and conferences were held at said club with Mrs. Price and her son, John K. Price, and Mr. Ferguson of the Security-First National Bank, co-executor [Tr. pp. 34, 35].

Petitioner Lyndol L. Young's uncontradicted testimony completely demonstrates that the use of said petitioner's home and his clubs for business purposes connected with his law practice justifies the modest amounts claimed as business expenses in connection therewith in their 1952 returns. The total expense of maintaining said home for the year 1952 was approximately \$20,000.00 [Tr. p. 48]. The amount claimed by petitioner for the portion of said sum of \$20,000.00 for the business use of said home was only \$5,843.62, which amount follows a formula estab-

lished by the respondent Commissioner in his ruling covering the years 1948, 1949, 1950 and 1951. The total business club expense claimed by petitioner Lyndol L. Young in 1952 for all of his clubs, to wit, The Los Angeles Country Club, The Beach Club and the Los Angeles Stock Exchange Club was only \$2,134.00. Certainly this sum of money is a modest business expense for the evidence conclusively showed that petitioner Lyndol L. Young received substantial fees from his clients which more than justifies the amount of club expense claimed in 1952.

Under the title "Travel Expense" the Memorandum Opinion of the Tax Court states as follows:

"Petitioner claimed a deduction for travel expenses in the sum of \$3,500. Respondent allowed \$2,158.62. The vague and inconclusive evidence petitioner introduced would hardly support the allowance granted. It consists merely of statements by the petitioner that he spent the sums claimed on business trips. He mentioned a few trips such as a trip he said he made to Boston to confer with a client. His wife accompanied him and they visited their daughter in Newport, Rhode Island. He and his wife also journeyed to Hawaii where they stayed in a \$60 a day hotel room for three weeks. He testified 'part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted.' He claimed \$1,500 of the expenses of this trip as business travel expense. Respondent conceded that such a three week trip to Hawaii would cost \$1,500, but the proof that it was a business trip is insufficient. The rest of the evidence on this item is nothing more than a general statement of petitioner that the balance of the travel expense is connected with 'local matters, going to Arizona in 1952 * * * La Jolla,

San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs.'

The almost complete lack of evidence to support the claimed travel expenses means respondent's determination disallowing a deduction of \$1,341.38 for travel expenses is sustained."

The foregoing statement is completely contradicted by the testimony of the petitioner, which would have been in more detail concerning all of the trips involved in the claim of \$3,500.00 for travel expenses but for the admonition by the Judge of the Tax Court that the Court was not interested in the details involving the issues in the cases where petitioner represented his clients. Following this admonition petitioner limited the details concerning said services, as well as his testimony concerning the various services rendered by him on the trips covered in the claim for \$3,500.00 for travel expenses.

With reference to the sum of \$1,500.00 claimed by petitioner as travel expense for a business trip to Honolulu, the report of the representative of the respondent Commissioner, to wit, Mr. Morris, shows that the total cost of said trip was \$2,682.76, of which amount one-half thereof, \$1,341.38, was allowed by said representative of the respondent Commissioner and approved by the respondent Commissioner in his letter dated August 24, 1954 [Tr. pp. 65-73].

Petitioner claimed the sum of \$1,500.00 to cover the business expense connected with the Honolulu trip. At the hearing Judge Mulronev inquired as follows:

"The Court: How much was claimed for this one trip?

The Witness: \$1,500.00.

The Court: And you stayed how long?

The Witness: Three weeks, 21 days.

The Court: Does the Government contest the amount of that trip as \$1,500.00 for a trip to Hawaii and staying three [23] weeks.

Mr. Reardon: No, your Honor.”

We, therefore, have the approval of the respondent Commissioner, based upon the report of his representative Mr. Morris, of the sum of \$1,348.38 for said Honolulu trip, and the statement by the Government attorney to the Court that the Government did not contest the sum of \$1,500.00 to cover the Honolulu trip. It is, therefore, quite inconsistent for the Memorandum Opinion to state that the respondent Commissioner conceded that such a three-week trip to Hawaii would cost \$1,500.00 but the proof that it was a business trip is insufficient. The record completely refutes this dicta in the Memorandum Opinion. Petitioner Lyndol L. Young further testified that the sum of \$1,000.00 was allocated as a business expense for a trip to Boston, Massachusetts, where he conferred with the executives of his client The Liberty Mutual Insurance Company. It further appeared from said petitioner's testimony that this particular client had paid said petitioner the sum of \$175,000.00 as legal fees [Tr. p. 38]. Petitioner further testified that the sum of \$1,000.00 was allocated as a business expense for trips made to the State of Arizona, La Jolla, San Diego and Palm Springs for the purpose of representing his clients. The trips to Arizona were connected with the estate of J. E. Thompson, and with the legal affairs of his widow, and also to confer with the Filor sisters, clients of said petitioner, who paid him a fee of \$25,000.00 in 1952, as hereinabove specifi-

cally referred to. (See *Ann Filor Day, et al. v. United States, supra.*) The other trips, to La Jolla and San Diego, were likewise to confer with Mrs. Thompson during the summer months of 1952 when Mrs. Thompson was living in La Jolla, and on behalf of the Liberty Mutual Insurance Company. These trips include railroad and airline transportation fares, hotel accommodations and expense money en route to the various states and cities where said petitioner travelled. It further appeared from the testimony of said petitioner that his total travel expense for the year 1952 was \$7,500.00, and that only the sum of \$3,500.00 was allocated as a business expense directly connected with said petitioner's law practice. There is no question involved concerning the correctness of this disbursement as it conclusively appears from the record that petitioner's vouchers and checks were examined and verified by Mr. Morris, the representative of the respondent Commissioner [Tr. pp. 51, 65-73].

Argument of the Law.

The Memorandum Opinion states:

"The respondent allowed a portion of each item and the record here, *consisting only of petitioner's testimony*, is designed to establish that additional allowances should have been made. Since the question is purely one of fact upon which the petitioner had the burden of proof, we can discuss the evidence with respect to each item separately" [Tr. p. 75; emphasis added].

The foregoing quotation clearly indicates that the deduction claimed by petitioners for business expense was authorized by the statute. So far as the reasonableness of the respective amounts claimed is concerned the uncon-

tradicted testimony of petitioner Lyndol L. Young, and the previous rulings of the respondent Commissioner in the years 1948, 1949, 1950 and 1951 when considered with the arbitrary action of the respondent Commissioner in drastically changing his formula established by him in said prior years without notice to petitioners, and with great prejudice to them, clearly indicates that a mistake has been made in this case by the decision of the Tax Court. Petitioners repeat that no Findings of Fact were made by the Tax Court. Even though the Memorandum Opinion had set forth Findings of Fact in line with the tenor of said Memorandum Opinion, still such Findings would not be supported by the undisputed evidence. In the case of *McGah v. Commissioner of Internal Revenue*, 210 F. 2d 769, at page 771, this Court states the rule as follows:

“[4] Petitioner urges that there is no substantial evidence to support such a finding. While giving careful consideration to the finding of the Tax Court, we draw our own inferences from undisputed facts. *Gillette's Estate v. Commissioner of Internal Revenue*, 9 Cir., 1950, 182 F. 2d 1010; *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 9 Cir., 1949, 178 F. 2d 541. A consideration of the entire evidence leaves us with the firm conviction that a mistake has been made in this case.”

In the case of *Wener v. Commissioner of Internal Revenue*, 242 F. 2d 938 at pages 944 and 945, this Court states:

“[6-8] A. *The Scope of Review.*

“Under the law, the scope of our review, in cases of this character, is the same as on appeal

‘from decisions of district courts in civil actions tried without a jury.’

“The findings of the Tax Court will not be disturbed unless clear error appears. But concededly

when the facts are not in dispute and wrong legal conclusions are attached to them, we are not bound to respect them but may draw different and correct ones of our own.

“[9] In the case before us, the findings are based chiefly upon stipulated facts and documentary evidence. The only witness who testified before the Tax Court was one of the taxpayers, Harold Wener. His testimony related to the circumstances under which the threatened failure of his business venture in California compelled him to conduct the negotiations which resulted in the agreement to accept \$35,000 in cash for the three installments not yet due. *His testimony was not contradicted. He has not been otherwise impeached and his testimony not being inherently improbable, cannot be disregarded, although he is an interested party*” (citing cases in footnote 22; emphasis added).

The Memorandum Opinion, as above indicated by the added emphasis, seems to belittle the petitioner's testimony as insufficient to sustain the burden of proof placed on petitioners. The respondent Commissioner offered no evidence of any kind. It appears from all of the records of the respondent Commissioner, as well as the testimony of the petitioner Lyndol L. Young that all of the claims concerning the amounts expended by petitioners as business expense were verified by the representatives of the respondent Commissioner in checking the records of said petitioners. Under these circumstances the applicable rule is well stated in the following cases, to wit:

In the case of *Blackmer v. Commissioner of Internal Revenue*, 70 F. 2d 257, the Court states:

“The expenses were therefore ordinary and necessary expenses. Although the sums were substantial,

the Board should not have refused the deduction. It is said that the amount was not established with absolute certainty. But the deduction should have been allowed, since it appears in the record that the amount claimed was reasonable under all the circumstances. Not only was all of it expended for business purposes, but, as the taxpayer testified, even a larger sum was. *Cohan v. Comm'r.*, 39 F. (2d) 540 (C. C. A. 2). When the evidence before the Board as the trier of the facts, ought to be convincing, it may not say that it is not. *Sioux City Stockyard Co. v. Comm'r.*, 59 F. (2d) 944 (C. C. A. 8); *Conrad & Co. v. Comm'r.*, 50 F. (2d) 576 (C. C. A. 1); *Chicago Ry. Equipment Co. v. Blair*, 20 F. (2d) 10 (C. C. A. 7). And the Board may not arbitrarily discredit the testimony of an unimpeached taxpayer so far as he testifies to facts. A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling. *Boggs & Buhl v. Comm'r.*, 34 F. (2d) 859 (C. C. A. 3).

“The amounts here sought to be deducted as ordinary and necessary expenses should have been allowed in the calculation of the petitioner’s tax.”

The Memorandum Opinion of the Tax Court under the title “Business Promotional Expenses” states as follows:

“Petitioner’s main argument to establish this item is (1) his claim is reasonable in view of his gross income (\$61,000.00), and (2) that similar amounts had been allowed in previous years. There is nothing to his first argument as his burden was to show actual expenditures for a business purpose. His burden is not satisfied merely by testifying a substantial portion of his law business was carried on in his home and then allocating a certain sum from gross income as

home business expense. As to the second argument, the law is clear that respondent is not bound by determinations of his agents for earlier years. *South Chester Tube Company*, 14 T. C. 1229. See also *H. L. McBride*, 23 T. C. 901" [Tr. pp. 76, 77].

So far as the above quoted statement in said Memorandum Opinion is concerned to the effect that petitioner Lyndol L. Young merely testified that a substantial portion of his law business was carried on in his home, and then allocating a certain sum from gross income as a business expense, does not satisfy petitioner's burden is not supported by the record. The testimony of said petitioner, as hereinabove set forth, specifically names the clients and the character of their legal business where the services were rendered from his home, and if there is any criticism concerning the extent and detail of petitioner's testimony in this respect, it is not the fault of the petitioner because said petitioner was restricted by the trial Judge from going into the detail involved in the matters concerning his clients which were performed in his home. As to the statement in said Memorandum Opinion that the petitioner contends that his claim is reasonable solely in view of his gross income of \$61,000.00, this is contrary to the petitioner's testimony. On this subject matter the petitioner testified as follows:

"Q. Is it true that your sole reason, on the basis for taking these deductions, is that you regarded in view of your gross income these amounts were reasonable? A. Well, I felt that they were reasonable to the extent of the cost of the maintenance of the premises, and there was a reasonable allocation to the over-all cost, yes, and I also thought in relation to the income received in the year 1952, it was a reasonable

allocation of expense. The total expense of maintaining my home in 1952 was approximately \$20,000.00” [Tr. pp. 47, 48].

* * * * *

“Q. And your entire basis of claim of these deductions was your estimate of these amounts as being reasonable and in relation to your gross income? A. Yes, and in addition to that, to the matters, from my records, which are reviewed, covering the service, my legal service, and in cases I handled in 1952, the amount of work that appeared from those records I did in my home, and at the Country Club as well, and the Stock Exchange Club” [Tr. pp. 49, 50].

So far as the statement above quoted from the Memorandum Opinion is concerned to the effect that the law is clear that respondent Commissioner is not bound by the determinations of his agents of earlier years and then citing the two Tax Court cases referred to, this alleged legal proposition certainly is not supported by the law. The two cited Tax Court cases both in law and fact are clearly distinguishable from the evidence which was before the Tax Court in the petitioners’ case. The respondent Commissioner is estopped from arbitrarily changing a ruling made by him in previous years unless said ruling was made upon a mistake of law or fact or misrepresentation or fraud on the part of the taxpayers. We cited to the Tax Court the controlling case on this subject matter, to wit, *H. S. D. Company v. Kavanagh*, 191 F. 2d 831, 843-846, inclusive. No consideration whatever was given by the Tax Court to this authority which clearly supports the position of the petitioners. Under the recent decision of the Supreme Court of the United States in the case of *Automobile Club of Michigan v. Commissioner*, 1 L. Ed. 749, the

question of the authority or right of the Commissioner to change his previous rulings is limited to a case where the Commissioner in said previous rulings made a mistake of law; the Supreme Court in this respect having made the following declaration:

“The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.”

* * * * *

“Petitioner’s reliance on *H. S. D. Company v. Kavanagh* (C. A. 6th Mich.), 191 F. 2d 831; and *Woodworth v. Kales* (C. A. 6th Mich.), 26 F. 2d 178, is misplaced because those cases do not involve correction of an erroneous ruling of law.”

There is no claim made by the respondent Commissioner in petitioner’s case that the rulings of the Commissioner prior to 1952 which approved the business expense deductions made by petitioners were based on any mistake of law or fact or the result of any misrepresentation or fraud on the part of petitioners. The respondent Commissioner is, therefore, estopped from arbitrarily reversing his previous ruling to the great prejudice and detriment of petitioners.

Findings of Fact by the Tax Court in all cases decided by said Court are mandatory as a matter of law:

Int. Rev. Code, 1954, Sec. 7459 (Rule 52-A, F. R. C. P.);

Winnett v. Helvering, 68 F. 2d 614, 615;

Beldridge Oil Company v. Helvering, 69 F. 2d 432, 433;

Diller v. Commissioner of Internal Revenue, 91 F. 2d 194, 195;

Kelleher v. Commissioner of Internal Revenue, 94 F. 2d 294, 296;

Bell v. Commissioner of Internal Revenue, 139 F. 2d 147, 149;

Irish v. United States, 225 F. 2d 3, 8;

MacCrawe's Estate v. Commissioner of Internal Revenue, 240 F. 2d 841, 842.

Where the evidence is undisputed, as the record in this case discloses, this Court has the right to make its own evaluation of the conclusions to be determined from the facts established by the evidence. Although there are no Findings of Fact by the Tax Court in this case, it conclusively appears that in view of the undisputed evidence the Tax Court could not make valid Findings of Fact in favor of the respondent Commissioner. Under these circumstances petitioners respectfully submit that this Court should rule as a matter of law that the decision of the Tax Court is erroneous, and reverse said decision with directions to the Tax Court to enter Judgment in favor of the petitioners and allowing the business expense claims of said petitioners as follows, to wit, home expense \$5,843.62; club business expenses \$2,154.00; business cash disbursements \$3,150.00; business travel expense \$3,500.00. The evidence supporting these claims in the amounts stated is undisputed and uncontradicted.

In the case of *Helvering v. Taylor*, 293 U. S. 507, 515, 79 L. Ed. 623, the rule is stated by the Supreme Court of the United States as follows:

“Unquestionably the burden of proof is on the taxpayer to show that the Commissioner’s determination is invalid * * * Frequently, if not quite generally, evidence adequate to overthrow the Commissioner’s finding is also sufficient to show the correct amount,

if any, that is due * * * But where, as in this case, the taxpayers' evidence shows the Commissioner's determination to be arbitrary and excessive, it may not reasonably be held that he is bound to pay a tax that confessedly he does not owe, unless his evidence was sufficient also to establish the correct amount that lawfully might be charged against him."

See also:

Gillette's Estate v. Commissioner of Internal Revenue, 182 F. 2d 1010, 1013, 1014;

E. H. Sheldon & Co. v. Commissioner of Internal Revenue, 214 F. 2d 655, 658, 659;

Consolidated Naval Stores Company v. Fahs, 227 F. 2d 923, 925, 926, 927;

Maytag v. Commissioner of Internal Revenue, 187 F. 2d 962, 964;

Durwood v. Commissioner of Internal Revenue, 159 F. 2d 400, 405.

Respectfully submitted,

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Attorneys for Petitioners.

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**In the United States Court of Appeals
for the Ninth Circuit**

LYNDOL L. YOUNG and MILDRED W. YOUNG,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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FILED



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16177

LYNDOL L. YOUNG and MILDRED W. YOUNG,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court is not officially reported. (R. 74-78.)

JURISDICTION

The petition for review (R. 80-84) involves federal income taxes for the taxable year 1952. On March 9, 1955, the Commissioner of Internal Revenue mailed to the taxpayers a notice of deficiency in the amount of \$7,705.78. (R. 9-12.) Within

ninety days thereafter and on May 19, 1955, the taxpayers¹ filed a petition with the Tax Court for a redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3-15.) The decision of the Tax Court was entered on April 7, 1958. (R. 79.) The case is brought to this Court by a petition for review filed June 11, 1958. (R. 85.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that the taxpayer had failed to satisfy his burden of proving that he was entitled to business expense deductions under Section 23(a)(1)(A) of the 1939 Internal Revenue Code in excess of the amounts allowed by the Commissioner for the following items: business promotional expenses at taxpayer's residence; dues and expenses at various clubs; and business travel expenses.

2. Whether the Tax Court fulfilled the statutory requirement of Section 7459(b) of the 1954 Internal Revenue Code by rendering a memorandum opinion containing the facts presented by the case but not setting out the findings of fact as a separate category of the report.

¹ Mildred W. Young is a petitioner in this case only by virtue of the fact that she filed a joint income tax return for the taxable year 1952 with her husband Lyndol L. Young; consequently, reference to taxpayer hereafter in this brief refers to the taxpayer husband, Lyndol L. Young.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*. —

(A) *In General*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

* * * *

(26 U.S.C. 1952 ed., Sec. 24.)

Internal Revenue Code of 1954:

SEC. 7459. REPORTS AND DECISIONS.

* * * *

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7459.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.23 (a)-2 *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

* * * *

Sec. 39.24 (a)-1 *Personal and family expenses.* * * * In the case of a professional man who rents a property for residential purposes, but incidentally receives clients, patients, or callers

there in connection with his professional work (his place of business being elsewhere), no part of the rent is deductible as a business expense. If, however, he uses part of the house for his office, such portion of the rent as is properly attributable to such office is deductible.

* * * *

STATEMENT

The facts as found by the Tax Court are contained within the memorandum opinion rendered by that court. (R. 74-78.) The facts, based on the evidence introduced at the trial which consisted entirely of the taxpayer's testimony (R. 75), may be summarized as follows:

The taxpayer, a lawyer, and his wife filed their joint income tax return for the taxable year 1952 with the District Director of Internal Revenue, Los Angeles, California. In his return filed for the taxable year 1952, the taxpayer claimed business deductions for promotional expenses connected with his personal residence, club dues and expenses and travel expenses in the amounts of \$9,493.62, \$2,154 and \$3,500 respectively. The Commissioner disallowed a portion of the amount of the expenses on each of the respective items as claimed by the taxpayer. Consequently, the Commissioner determined a deficiency in the taxpayer's income tax for the calendar year 1952 in the amount of \$7,705.78. The court, upon considering the testimony pertaining to each item with respect to which expenses were in controversy, decided that in all instances the taxpayer had completely

failed to meet his burden of proving that his actual expenses were greater than the amounts the Commissioner had allowed. (R. 74-75.) From this decision, the taxpayer has appealed to this Court.²

The taxpayer's personal residence was located at 138 North June Street, Los Angeles, California. In his 1952 tax return, the taxpayer claimed as a business expense \$9,493.62 of the expenditures incurred in the operation of his personal residence. Specifically, the amount claimed was an allocation of a portion of the total household expense incurred in that year. The amount claimed was composed of expenditures for servants, groceries, utilities, yard expenses and other similar items. Although the taxpayer maintained a downtown law office, he testified that some of his clients came to his home during the taxable year. Accordingly, the Commissioner allowed \$750 of the claimed amount of the household expense as a business deduction. The taxpayer stated that in the taxable year 1952 his gross income from his legal practice alone was \$61,000 and that in prior years an amount similar to his 1952 claimed deduc-

² In the court below, the taxpayer claimed a deduction for depreciation that was \$3,000 in excess of what the Commissioner had allowed. The disputed amount represented depreciation on taxpayer's automobile of \$1,000 per year for the three tax years prior to 1952. The taxpayer had neglected to take this amount as a deduction on his returns for those years. The Tax Court held that the taxpayer could not take the claimed deduction of \$3,000 in the taxable year 1952 since he should have taken it in the years the depreciation actually took place. (R. 78.) Apparently, the taxpayer does not now press this claim. (Br. 6-10.)

tion had been allowed as a business expense on account of his household operations expense incurred in his legal practice. The only evidence the taxpayer introduced below was his general statement that he carried on a substantial portion of his legal practice in his home. He totally failed to show what portion of his total home expenditures were related to his legal practice. The Tax Court held that the Commissioner had correctly disallowed the amount in controversy and that the taxpayer had failed to satisfy his burden of showing he was entitled to a greater amount of business expense in operating his residence than the amount allowed him by the Commissioner. (R. 76.)

In 1952 the taxpayer belonged to the Los Angeles Country Club, the Stock Exchange Club in downtown Los Angeles, and the Beach Club in Santa Monica. On his 1952 income tax return, the taxpayer claimed \$2,154 as a business deduction on account of club dues and expenses. The Commissioner disallowed \$1,146 of that amount thereby allowing the taxpayer a deduction for the business expenses related to his club memberships in the amount of \$1,008. The Beach Club was not sued for business purposes according to the evidence introduced at the trial below. The taxpayer testified that a few business conferences took place at the Los Angeles Country Club and the Stock Exchange Club; however, he failed to maintain records of either the business conferences or the business expenditures incurred at the clubs. The taxpayer stated that he and his wife frequently dined at the clubs, generally every Sunday, and that

to a certain extent the clubs were used by both of them for social and personal purposes. The Tax Court typified the taxpayer's testimony as "meager" and "unsatisfactory" and held that the Commissioner correctly disallowed the alleged club expenses in the amount of \$1,146. (R. 75-76.)

The taxpayer claimed a business deduction of \$3,500 in connection with his travel expenses for the taxable year 1952. Of this amount, the Commissioner allowed \$2,158.62. At trial the evidence introduced amounted merely to the taxpayer's statements that he spent the claimed sums on business trips. He stated that he made a trip to Boston to confer with a client; however, on this trip his wife accompanied him and they visited their daughter in Newport, Rhode Island. The taxpayer and his wife also visited Hawaii where they stayed for three weeks in a \$60 a day hotel room. In this regard, the taxpayer stated that "part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted". The taxpayer claimed \$1,500 of the expenses connected with this trip as business travel expenses. Although the Commissioner admitted below that a trip such as this to Hawaii would cost \$1,500, the taxpayer had failed to prove that the trip itself was for business purposes. The remainder of the testimony presented as to the claimed travel expenses was merely the taxpayer's general statement that the balance of his travel expense was connected with "local matters, going to Arizona in 1952 * * * La Jolla, San Diego, and trips

in connection with these insurance company cases where bad accidents occurred, down at Palm Springs.” The Tax Court held that the “vague” and “inconclusive” testimony of the taxpayer would hardly support the allowance granted by the Commissioner. Accordingly, the lower court sustained the Commissioner’s disallowance in the amount of \$1,341.38 of the taxpayer’s claimed business deduction for travel expenses. (R. 77-78.)

SUMMARY OF ARGUMENT

The taxpayer contends that he is entitled to larger business expense deductions for his household operations relating to his legal practice, his club affiliation expenses, and the expenses incurred in his travels than the amounts allowed him by the Commissioner. The evidence introduced by the taxpayer consisted entirely of his own testimony which was not concerned in any way with showing what expenses he incurred in the taxable year 1952 that related to his legal practice nor did he make any attempt towards establishing the actual amounts of the alleged expenses in that taxable year. The taxpayer in effect substituted his required burden of proving the amount of his actual expenses by merely testifying that he had business clients who conferred with him at his home and clubs, that he made trips for business purposes, that he received specific fees from certain clients, and that he incurred expenses in receipt of this income. Apparently it is the taxpayer’s position that he is entitled to deductions in the amount he claims because he feels they are reasonable in comparison with his in-

come for 1952 and further he had taken deductions in approximately the same amounts in prior years.

The Tax Court found the taxpayer's testimony to be exceedingly unsatisfactory and fully deficient for substantiating the deductions for the expenses he claimed he incurred. The Tax Court was also very much unimpressed by the taxpayer's attempt to substantiate a deduction in the amount he claimed in the taxable year 1952 by showing that he had taken deductions in approximately the same amount for a number of years prior to 1952. The Tax Court accordingly found for the Commissioner since the court below held that the taxpayer had completely failed to satisfy his burden of establishing his case. The record fully supports the Tax Court decision and certainly warrants affirmance by this Court. The taxpayer has failed to present any matters of substance in his present brief, and he has further failed to show that the Tax Court's decision was in any way clearly erroneous.

The taxpayer also objects to the fact that the Tax Court rendered a memorandum opinion which contained the facts of the case within the opinion itself rather than setting out the findings of fact in a separate category. This objection is without merit in that a Tax Court memorandum opinion that does not contain a separate category of findings of fact is certainly in conformity with the statutory authority; furthermore, perhaps in this case it is the most logical manner of stating the facts presented by each aspect of the proceeding. The memorandum opinion

certainly contained all the pertinent facts presented by this case and correctly decided each matter.

ARGUMENT

I

The Tax Court Correctly Held That the Taxpayer Failed To Introduce Evidence That Would Entitle Him To Larger Business Expense Deductions In Connection With His Personal Residence, Clubs, and Travel Than the Amounts Allowed Him By the Commissioner

The taxpayer is claiming that he incurred greater business expenses in operating his personal residence, maintaining his club affiliations, and in connection with his travels than the respective amounts allowed him by the Commissioner. (Br. 6-10.) The amounts of the deductions allowed the taxpayer by the Commissioner were in all instances specifically approved by the court below. In a proceeding such as this, it must be acknowledged that a presumption of correctness attaches to the Commissioner's determination and that the taxpayer has the burden of proving otherwise. *Helvering v. Nat. Grocery Co.*, 304 U. S. 282; *Helvering v. Taylor*, 293 U. S. 507; *Showell v. Commissioner*, 238 F. 2d 148 (C. A. 9th), rehearing denied, 238 F. 2d 155. When the evidence introduced by a taxpayer is less than satisfactory and/or uncorroborated, surely the trier of the facts has the best opportunity to determine whether the taxpayer's claim, or any part of it, should be denied. *Showell v. Commissioner*, *supra*, p. 152; *Baumgardner v. Commissioner*, 251 F. 2d 311 (C. A. 9th). The court

below noted that the only evidence presented before it was the testimony of the taxpayer, and the trial judge stated throughout the opinion that this testimony was "meager", "unsatisfactory", "vague", "inconclusive", and "insufficient". (R. 75, 77.) The Tax Court determined that there was no question but that the taxpayer had utterly failed to prove his case. Certainly, a case such as this presents only questions relating to factual matters, and this Court has often stated that the Tax Court's findings will not be disturbed unless a clear error appears. *Baumgardner v. Commissioner*, *supra*; *National Brass Works v. Commissioner*, 205 F. 2d 104 (C. A. 9th); *Cohn v. Commissioner*, 226 F. 2d 22 (C. A. 9th); *Ward v. Commissioner*, 224 F. 2d 547 (C. A. 9th). And, moreover, the burden of proving that there is a clear error in the Tax Court's determination is imposed on the party appealing the decision. *Wener v. Commissioner*, 242 F. 2d 938 (C. A. 9th).

We submit that the Tax Court's decision in the instant case is irrefutably correct as to every matter decided by it. The nature of the taxpayer's testimony and his total failure to prove his claims necessitated the Tax Court to deny any alleged amounts of business expenses in excess of the deductions allowed him by the Commissioner. We further submit that the taxpayer's present brief is thoroughly deficient in showing any error committed by the Tax Court. The taxpayer never introduced evidence upon which the Tax Court could have granted him deductions in excess of the amounts allowed him by the

Commissioner, nor were there any matters of substance as introduced by the taxpayer at trial that were not considered by the lower court. The facts presented in this case together with the taxpayer's failure to introduce the necessary evidence to support his alleged claims conclusively prove that the Tax Court opinion was correct in all respects.

An examination of the evidence introduced by the taxpayer regarding his claim for household business expenses in connection with his legal practice shows that his testimony is utterly void as to any specific amounts of business expenses of this type incurred by him in the taxable year under review. Apparently the taxpayer determined that he could establish his claimed business deduction for household expenses by showing that because he conducted part of his legal practice with certain clients in his home for a number of years and that since he had a large income from his legal practice the amount he claimed was reasonable and therefore should be allowed. (Br. 6-8; R. 48-50.) Furthermore, he also seems to be under the impression that since similar amounts were allowed in prior years the Commissioner was again bound to grant him amounts approximating the prior deductions in taxable year 1952. (Br. 9-10; R. 36.)

The taxpayer went into great detail in elaborately describing what type of legal practice he conducted, who his clients were, and the amount of fees he received. (R. 23-24.) However, he did not even attempt or possibly was unable to state what expenses he incurred in 1952 at his home that were in any way related to his legal practice; in fact, there is a serious

question as to whether the taxpayer incurred any household expenses at all in connection with his law practice in the taxable year 1952. (R. 49-50.) The taxpayer testified only that the total cost of operating his home was \$20,000, and he allocated a "reasonable" amount as a business expense. (R. 48.) Specifically as to these expenses, his only additional testimony was directed towards the nature of the items composing the amounts which he claims would be business expenses. His testimony reads (R. 46-47):

Q. (By Mr. Reardon): Now, directing your attention to the amounts claimed on the business promotional expense in 1952, and substantiating this claim you submitted cancelled checks to the agent?

A. Yes.

Q. And these include amounts for—now, correct me if I am mistaken: Butler, poultry, plumbing, cleaning, and laundry, groceries, miscellaneous household, water, power and gas, garden, vegetables, yard maintenance, electric maintenance, florist and milk.

A. All those items are everything connected with the operation of the premises and the maintenance of living there.

Q. Your home there on North June Street in the year 1952 was adjacent to the Wilshire Country Club?

A. Yes.

Upon due consideration of this evidence as introduced by the taxpayer, it seems difficult to understand how any of his claims in this category were allowed. Nevertheless, the Commissioner did grant the

taxpayer a business deduction of \$750³ for the expense of operating his home even though the taxpayer maintained a law office in downtown Los Angeles. In this connection the Commissioner had granted the taxpayer a deduction for all the expenses he claimed as business telephone calls in 1952 on his home telephone (the taxpayer did not segregate his business and personal calls on his home telephone). Moreover, there was no office equipment, not even a typewriter, in his home, and his secretary was never in his home in 1952. (R. 41-42, 48, 49.) Indeed ~~it~~ could be stated without reservation that the Commissioner was quite generous in granting the taxpayer a deduction in the amount that was allowed for 1952.

The taxpayer urges that his club expenses for the taxable year 1952 were actually \$2,154 although the Commissioner allowed only \$1,008 of that amount; consequently, he claims, the Tax Court committed error in sustaining the Commissioner's determination. (Br. 8-9.) Here again, the taxpayer's evidence was not directed towards proving the specific amount he claims but instead was only concerned

³ The taxpayer has specified as an error the Tax Court's statement that he was claiming \$9,493.62 as a business expense of maintaining his residence whereas, he states, he was actually only claiming \$5,843.62 as a business expense and the balance of \$3,150 were "cash disbursements" made in connection with the maintenance of his law practice. (Br. 7.) However, the taxpayer's 1952 income tax return, his petition for redetermination of the deficiency as filed in the Tax Court, the opening statement of his counsel, and his own testimony leaves no doubt that the so-called "cash disbursements" expenses were for costs related to his personal residence. (R. 5-6, 19, 46-47, 52, 60.)

with his clients, who, at one time or another, had been at one of his clubs for business purposes. (R. 27-35.) It definitely appeared that very little, if any, business use was made of the taxpayer's club affiliations in 1952. (R. 42-46.) His testimony suggests that the taxpayer and his wife utilized the Beach Club for personal reasons only in 1952. (R. 44-46.) Although the taxpayer only testified as to these claims, he did state that he had records, bills, and statements substantiating the amounts spent at the clubs which he did not bring to the trial. (R. 42-43.) It seems almost inconceivable that an individual of taxpayer's qualifications would fail to introduce this most pertinent evidence if it did support his claim that the club expenses were in fact business expenses. Perhaps the substance of the taxpayer's position is best explained by the following statement in his present brief (p. 15):

Certainly this sum of money [\$2,154] is a modest business expense for the evidence conclusively showed that petitioner Lyndol L. Young received substantial fees from his clients which more than justifies the amount of club expense claimed in 1952.

The taxpayer is thus virtually admitting that he is unable to substantiate his claim for a club expense deduction in the amount he requests except on his own subjective basis as to what he feels is a reasonable expense in comparison with the income he earned in 1952. This, of course, is insufficient to justify the allowance he seeks.

The taxpayer offered very little evidence, again consisting entirely of his own testimony, substantiating his claim for travel expense in the amount of \$3,500. (R. 37-38.) The Commissioner reduced this amount to \$2,158.62 which was upheld by the Tax Court. (R. 77-78.) The taxpayer's testimony leaves no doubt that the Tax Court was correct in describing it as "vague" and "inconclusive". (R. 77.) In support of a claimed business trip to Honolulu, Hawaii, in which he was accompanied by his wife, both staying at the Royal Hawaiian Hotel in a \$60 per day room for three weeks, the taxpayer's sole evidence introduced at trial was the following statement (R. 37):

* * * part of the trip was to conduct an inquiry with reference to the wife of a client of mine who was then in Honolulu at the Royal Hawaiian Hotel, which inquiry was conducted.

The taxpayer claims that the Commissioner conceded that such a trip would cost \$1,500. (Br. 16-17; R. 38.) Be that as it may, there is certainly no concession by the Commissioner nor proof by the taxpayer that this particular trip was in fact one of a business nature.

The taxpayer's testimony as to his other business trips is quite ambivalent. Although he states he made a business trip to Boston and New York, he acknowledges that his wife accompanied him and that they visited their daughter and son-in-law in Newport, Rhode Island. The taxpayer did not testify as to the nature of the expenses, their composition, or whether the Commissioner disallowed this specific claim; he

only stated that he allocated \$1,000 of the expenses incurred in this trip as business expenses. He claims his other travel expenses were in connection with local matters such as "going to Arizona in 1952 * * * La Jolla, San Diego, and trips in connection with these insurance company cases where bad accidents occurred, down at Palm Springs". (R. 38.) Once again, the taxpayer's own statement is indicative of the method by which he determined his alleged business expenses pertaining to his travels. He stated, "I think that \$3,500 out of the total expense of \$7,500.00 would be a fair division of the allocated business expense". (R. 38.) In other words, he was totally unable to introduce any evidence to substantiate this claim.

Apparently the taxpayer feels that the court below did not allow him the opportunity of presenting all the evidence he wished to introduce. (Br. 3, 22.) In fact, the taxpayer has set out in his brief a portion of the testimony during which the trial judge urged the taxpayer to refrain from presenting so many irrelevant details, but instead, present facts upon which the court could render a decision. Taxpayer has characterized this request from the bench as an "admonition from the Court" (Br. 3, 16), a description which is neither accurate nor justified. Nevertheless, the record does show that the taxpayer continued to present additional testimony that was very descriptive in detail but still quite deficient in showing how he was entitled to business deductions for the amounts he claimed.

As we previously mentioned, the taxpayer has urged throughout that since he filed returns for years prior to 1952 claiming the approximate amount of the deductions now in issue, he should accordingly be allowed the deductions in the amounts he claims for 1952. (Br. 9-10, 14-15, 18-19, 23-24.) Apparently taxpayer reasons that the Commissioner by accepting the returns for those years had in effect issued a ruling upon which the taxpayer has relied; therefore, the taxpayer contends the Commissioner is estopped from disallowing the amounts now in controversy. Suffice it to say, that the word ruling in regard to the administration of the internal revenue laws has a very specific and technical meaning which by no means has any relation to the factual situation concerning this particular aspect of the case at bar. But be that as it may, even erroneous rulings can be corrected by the Commissioner; the Commissioner is not estopped from correcting a mistake. *Automobile Club v. Commissioner*, 353 U. S. 180; *Landau v. Riddell*, 255 F. 2d 252 (C. A. 9th).

In the instant case the Tax Court recognized the factual situation as it actually exists and succinctly answered the taxpayer's argument. The lower court, citing *South Chester Tube Co. v. Commissioner*, 14 T. C. 1229, and *McBride v. Commissioner*, 23 T. C. 901, held that the Commissioner is not bound by the determinations of his agents for prior years. The taxpayer answers that these cases are not in point; we contend that they are very much in point. And also see, *Caldwell v. Commissioner*, 202 F. 2d 112 (C. A. 2d); *Mt. Vernon Trust Co. v. Commissioner*,

75 F. 2d 938 (C. A. 2d); *Savage v. Commissioner*, 31 B. T. A. 633, reversed on other grounds, 82 F. 2d 92 (C. A. 3d); *Estate of Shore v. Commissioner*, decided March 28, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,075). The cases have noted that a failure by the Commissioner to challenge an incorrect claim made by the taxpayer may well indicate nothing more than oversight, error, or lack of information rather than acquiescence as to the taxpayer's claim.

II

The Tax Court Was In Full Accord With the Statutory Requirement of Section 7459(b) of the 1954 Internal Revenue Code When In the Instant Case It Rendered a Memorandum Opinion Containing Within the Opinion Itself the Facts Presented By the Case Rather Than Setting Them Out As a Separate Category of the Report

As an additional error, the taxpayer contends that the Tax Court erred in failing to make separate findings of fact in its memorandum opinion. (Br. 6, 24-25.) The pertinent statutory requirement concerning this matter is presented in Section 7459(b) of the 1954 Internal Revenue Code, *supra*, which reads as follows:

Inclusion of Findings of Fact or Opinions in Report.—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

The contention that the Tax Court had failed to follow the aforementioned statutory authority which the taxpayer contends requires specific findings of fact is certainly not a novel argument. This is a contention that has often been litigated and further has clearly been answered in opposition to taxpayer's position. For instance, in *Emerald Oil Co. v. Commissioner*, 72 F. 2d 681 (C. A. 10th) the Tenth Circuit upon reviewing the facts there presented held (p. 683) :

The Board in its memorandum opinion set out the facts upon which its decision was based, but did not make separate findings of fact. This is assigned as error. Under section 907 (b) of the Revenue Act of 1924, as added by Revenue Act 1926, § 1000 (26 USCA § 1219 note), the Board was required to make findings of fact. *Kendrick Coal & Dock Co. v. Commissioner* (C. C. A. 8) 29 F.(2d) 559.

But section 601 of the Revenue Act of 1928 (45 Stat. 871, 872 [26 USCA § 1219]) reads in part as follows:

"Sections 906 and 907 (a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows: * * *

" 'Sec. 907 * * * (b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.' " ⁴

⁴ The sole change between the statute then in effect and the present is that the word "Board" has been changed to "Tax Court". Section 7459 of the 1954 Code.

By the use of the disjunctive "or," Congress manifested the intention to leave it optional with the Board to make its report in the form of special findings, an opinion, or a memorandum opinion. See House Reports, Vol. 1, No. 2, p. 30, 70th Congress, First Session. Under section 907(b) as amended a written opinion may perform the function of a finding of fact, and we may look to it to determine what the decision is and the facts upon which it is based. *Olson v. Commissioner* (C. C. A. 7) 67 F.(2d) 726; *Insurance & Title Guarantee Co. v. Commissioner* (C. C. A. 2) 36 F.(2d) 842; *Commissioner v. Crescent Leather Co.* (C. C. A. 1) 40 F.(2d) 833, 834; *California Iron Yards Co. v. Commissioner* (C. C. A. 9) 47 F.(2d) 514, 518; *Shepard & Myers, Inc., v. Commissioner* (C. C. A. 3) 45 F.(2d) 50, 51.

Subsequent to the decision in the *Emerald Oil* case, this Court also held that an appellate court may look to a Tax Court opinion for the facts presented by the case. *California Barrel Co. v. Commissioner*, 81 F. 2d 190, 193.

CONCLUSION

For the aforementioned reasons, the opinion of the Tax Court is correct in all respects and should be affirmed.

Respectfully submitted,

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MARCH, 1959



No. 16177

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LYNDOL L. YOUNG and MILDRED W. YOUNG,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the Tax Court
of the United States.

PETITIONERS' REPLY BRIEF.

LYNDOL L. YOUNG, and
FRANCIS J. McENTEE,

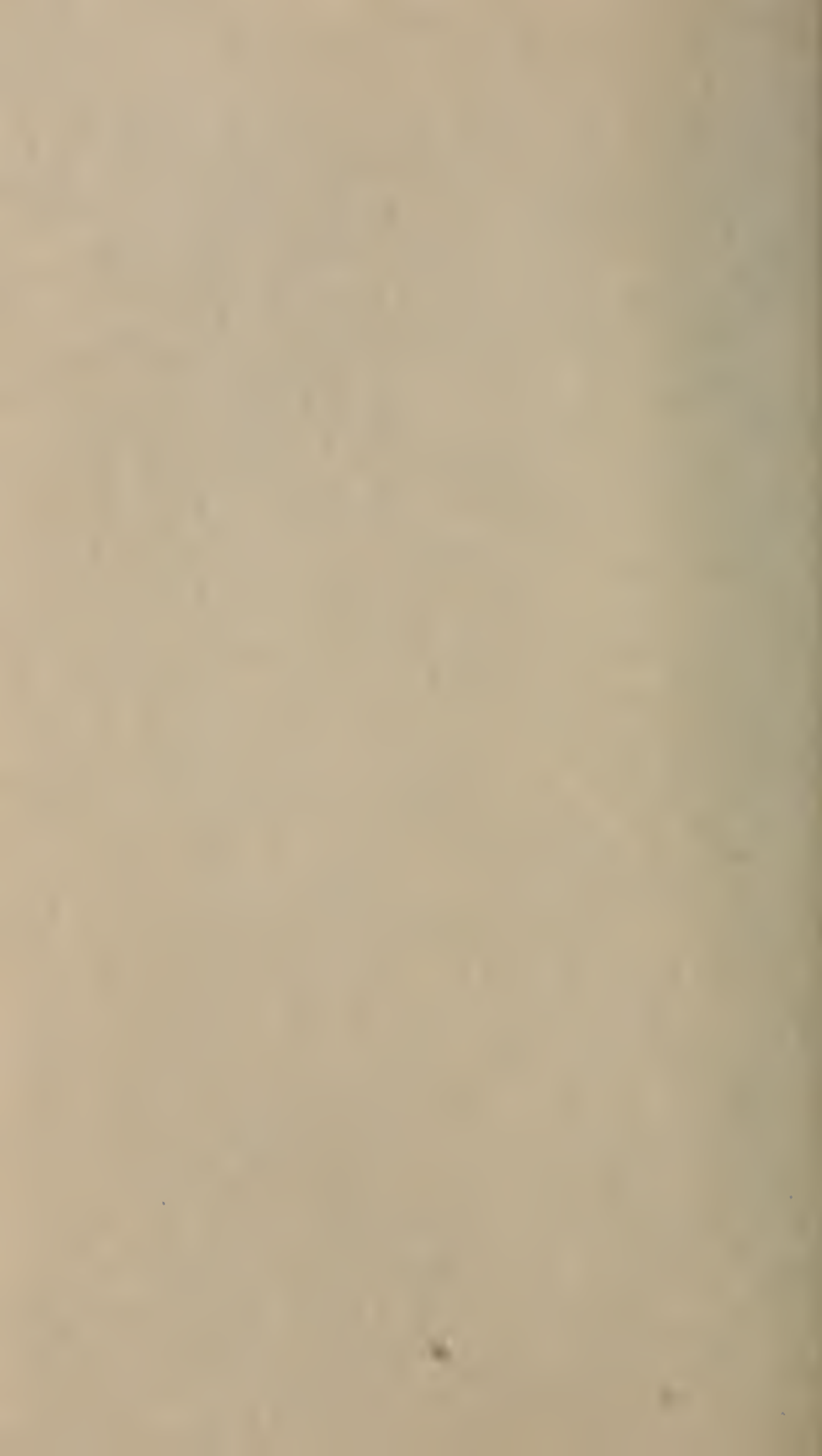
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PETITIONERS' REPLY BRIEF.

The Brief of the Respondent is replete with incorrect statements of the record and the evidence in this case.

No facts are found or contained in the Memorandum Opinion of the Tax Court, as contended by the Respondent. Contrary thereto only conclusions are contained in the Memorandum Opinion of the Tax Court. Facts found must be based on the evidence. The Tax Court Opinion does not attempt to state the evidence which is uncontradicted, and does not support the Memorandum Opinion. The references in the opinion to the testimony of taxpayers as "vague" and "inconclusive," "meager" and "unsatisfactory" are mere conclusions. The evidence is to the contrary.

Residence Business Expenses.

Despite the repeated statement in Respondent's Brief that the taxpayer claimed as a business expense the sum of \$9,493.62 in connection with the business use of his home where taxpayer carried on the substantial part of his law practice, the correct amount claimed by taxpayer was \$5,843.62. There is no justification for the Respondent to misstate the correct amount of this item of business expense as there cannot possibly be any uncertainty about the same [see Tr. pp. 4-6, 13-14, 19, 88, par. 4; Supp. Tr. pp. 100-101]. Furthermore, as Respondent knows, the official files of the Respondent involving the income tax return of the taxpayer for the year 1952 contains taxpayers' protest to the Revenue Agent's report concerning his examination of taxpayers' records for the year 1952, and that said protest on page 5, paragraph 5, expressly states:

"Taxpayers take exception to Finding (f) which completely disallows the claim of \$9,493.62, which is reported as business promotional expense at 138 North June Street. The title of this expense is a misnomer as only a part of the \$9,493.62 is applicable to 138 North June Street. Agent Morris was advised at the time of his examination of taxpayers records that the sum of \$3,650.00 of said amount was attributable to cash received by taxpayer Lyndol L. Young from pocket checks drawn by him on his bank account and used by him in making cash disbursements for ordinary business expenses incurred during the year 1952, and that the sum of \$5,843.62 was attributable to 138 North June Street."

The taxpayer's Brief filed with the Tax Court and served on Respondent's attorneys states unequivocally that

the amount of this item of business expense is \$5,843.62 (Pet. Br. pp. 1, 3, 12, 18).

There is no justification, therefore, for the Respondent to attempt to misstate this item of business expenses, or any uncertainty concerning the amount thereof, as set forth in note 3, page 15, of Respondent's brief.

The Respondent is solely responsible for the inclusion in the income tax return of taxpayer for the year 1952 of the amount of this item of business expense, which is connected with the use of taxpayer's home as an office. The Respondent's files also contain a written formula which was established and prepared by the Respondent, and which sets up the allocation of the amount of the business expense connected with the taxpayer's home. This formula was prepared by the Respondent in connection with his examination of the taxpayer's income tax returns for the years 1948, 1949, 1950. The taxpayer followed this formula in his income tax return for the year 1952, and the amount claimed for the business use of the taxpayer's home is based on the Respondent's own formula. On the basis of his own formula the Respondent allowed the taxpayer as a business deduction for the use of his home in connection with his law practice the sum of \$5,456.73 in the year 1948, and the sum of \$4,747.76 in the year 1949, and the sum of \$4,998.70 in the year 1950. The Respondent also allowed approximately the same home expense as a business deduction in the year 1951. Respondent is now attempting to renege on his own formula which the taxpayer followed in the year 1952. In view of this formula, how can the Respondent claim there was any mistake in allowing as a business deduction the amount hereinabove set forth during the years 1948, 1949, 1950 and 1951? Relying on this formula and with the

assurance of the Respondent that the same would be applicable not only in the years 1948, 1949, 1950 and 1951, but also as to all subsequent years, the taxpayer accepted the same and paid additional income taxes as follows: For the year 1948 the sum of \$1,578.30; 1949 the sum of \$1,592.22; 1950 the sum of \$1,354.48; 1951 the sum of \$1,499.95. The Respondent made a thorough and complete examination and investigation of the taxpayer's records and all of the facts concerning the business use of the taxpayer's home during the years 1948, 1949, 1950 and 1951, and concluded that the taxpayer was entitled to claim as a deduction a portion of the expense for the maintenance of said home, which included all of the items described in Respondent's Brief at page 14 as follows: "Butler, poultry, plumbing, cleaning and laundry, groceries, miscellaneous household, water, power and gas, garden, vegetables, yard maintenance, electric maintenance, florist and milk." The formula set up by the Respondent included, and was based upon, all of these items. As aforesaid, the taxpayer was assured by the Respondent that this formula would apply not only to the years then under investigation, to wit, 1948, 1949 and 1950, but also to all future years. This formula was followed by Petitioner in 1951, and the amount claimed for this same expense was approved by the Respondent. In 1952 Mr. Morris, the representative of the Respondent, refused in his report to follow this formula, and disallowed the claim of the taxpayer for this item of business expense *in toto*. It is undisputed that the total maintenance cost of taxpayer's home was \$20,000 in 1952 [Tr. p. 34]. Following the Respondent's formula, the taxpayer allocated \$5,843.62 as a portion of the total cost of \$20,000 as attributable to business expense, which amount is in line with the

amounts allowed by the Respondent under his own formula for the prior years above mentioned. In view of the Respondent's conduct in establishing his own formula to determine this item of business expense the statements in Respondent's Brief at pages 12 and 13 are hard to understand. Such statements completely ignore the fact that the Respondent is solely responsible for his own formula covering the amount claimed for this item of business expense, and there is no basis whatsoever for any criticism of the taxpayer in following the formula of the Respondent in claiming the sum of \$5,843.62 to cover this item. Also, contrary to the Respondent's Brief that taxpayer made no showing of having used his home in 1952 in connection with his law practice, the record shows without contradiction that the taxpayer made the same use of his home in the year 1952 as he did in the years 1948, 1949, 1950 and 1951 [Tr. pp. 23-36]. In his testimony the taxpayer named the clients and the fees and the services rendered by him in his home during the year 1952. When the taxpayer attempted to go into the details of the services performed by him from his home he was admonished by Judge Mulroney that the Court was not interested in all of the details; that to go into such detail would be endless [Tr. p. 34]. The Respondent has completely failed to present the true record concerning the business use of taxpayer's home, and particularly the preparation of his own formula approving this use. He should not be permitted to repudiate his prior ruling based upon his own formula to the detriment of the taxpayer. There was no mistake and no attempt is made by the Respondent to show any mistake in the establishment of his own formula as a yardstick to determine the amount of this business deduction. How could there be any mistake of law or fact when the Respondent, after his own investigation and

examination of the taxpayer's records and the use made by the taxpayer of his home for business purposes, approved this identical claim for the prior years hereinabove mentioned? Certainly the Respondent would not be permitted to contend that a formula established by him and accepted by the taxpayer covering the depreciation of equipment or machinery could be changed by the Respondent in subsequent years arbitrarily and without justification. There is no distinction between this type of formula covering depreciation and the formula established by the Respondent covering the business use of the taxpayer's home. The Respondent seems to rest his attempt to repudiate his own formula established by him in 1953 and applied to the years 1948, 1949, 1950 and 1951 by insinuating to the Court at page 20 of his Brief that the cases there cited hold that "a failure by the Commissioner to challenge an incorrect claim may well indicate nothing more than oversight, error or lack of information rather than acquiescence as to taxpayer's claim." The taxpayer stated in his Brief at pages 14 and 15 that said claim for \$5,843.62 as a portion of the sum of \$20,000, the total cost for the maintenance of the taxpayer's home, followed a formula established by the Commissioner, and applied to the years 1948, 1949, 1950 and 1951. This statement has never been denied. This is not a case of mistake or error and no intimation has been made that there was any mistake or error until the Respondent filed his Brief. The formula referred to herein is in writing and is in the official files of the Respondent. The report of the Respondent's examining officer which applies this formula for the years 1948, 1949, 1950 is dated March 24, 1953. The report states: "The findings were discussed with the taxpayers. They have agreed with the findings, and have signed agreement form #870." The original of this report is

in the official files of the Respondent, and a copy thereof was received by the taxpayer from the Respondent. The taxpayer agreed to said findings of the Respondent's examining officer upon the consideration and assurance that the Respondent's formula covering the allocation of a portion of the cost of the maintenance of the taxpayer's home as a business expense would be followed by the Respondent, not only for the years 1948, 1949 and 1950, but also as to all future years while taxpayer used said home in connection with his law practice. Upon this consideration and assurance the taxpayer paid additional taxes for the years 1948, 1949 and 1950 in the total sum of \$4,525, and prepared and filed his income tax return for 1952, insofar as this item of business expense was concerned, upon the basis of said formula.

It is also undenied that Mr. Wulke allowed the sum of \$1,076 for the business use of taxpayer's home. In the deficiency letter of Respondent only the sum of \$750 is allowed. It is a complete mystery to the taxpayer how either of these figures were arrived at, and it is obvious that both of said figures are arbitrary and the result of mere guessing. It is also undenied that Mr. Wulke allowed the sum of \$2,000 for the business cash disbursement claim of the taxpayer in the sum of \$3,150 [Tr. pp. 12, 15].

The plain fact is that the revenue laws and regulations involved in this matter are so indefinite, vague and uncertain that no legal standard is provided upon which the Respondent Commissioner determines the business deductions that he disallows or reduces. It seems to be a guessing contest from the start to finish.

Club Dues and Expenses Business Cash Disbursements.

The carping criticisms in the Respondent's Brief concerning the business use of the taxpayer's clubs is plain doubletalk. The snide remarks concerning the taxpayer on page 16 of said Brief are completely unjustified. It would be more appropriate to paraphrase the same as follows: It seems almost inconceivable that an individual with the presumed legal qualifications to represent the Respondent Commissioner would engage in such folderol as to intimate to the Court that the amount of the taxpayer's claim covering this item in the sum of \$2,154 for club dues and expenses was not verified by the Respondent Commissioner prior to the trial, and that the amount of said expense was, therefore, an admitted fact. The Respondent well knows from his own files and reports that his agent Morris spent days in going over all of the taxpayer's checks and bills, including his club dues and expenses, and that there was no issue involved at the trial concerning the accuracy of all of the disbursements claimed by the taxpayer [Tr. pp. 42-43, 46, 51-52]. Neither has the Respondent put enough base under his argument that the club expenses claimed by taxpayer are not a business expense. The truth is that Respondent has admitted that it is a business expense, otherwise how does Respondent classify the allowance of 100% of all of the club dues paid by taxpayer as a business expense? The report of the examination of the Respondent concerning taxpayer's income tax return for 1952 contains the following statement:

“Taxpayer claimed club expense which included dues and amounts paid on bills from the clubs. The amount allowed as a business expense is the club dues of

\$1,008.00. The remainder is disallowed as no business connection was shown by the taxpayer of these other amounts of \$1,146.00 paid to the clubs" [Tr. pp. 69-70].

Apparently the Respondent's position is that it is all right for the taxpayer to belong to as many clubs as he desires and can afford, and that 100% of the dues paid to said clubs is a legitimate business expense but that, if taxpayer ever enters any of said clubs and incurs any expense in addition to his dues in connection with his business use of said clubs, the same is not deductible. The uncontradicted testimony of the taxpayer shows that the taxpayer used his clubs in connection with the legal business of his clients, and he named the clients that he consulted with in said clubs [Tr. pp. 27-29, 31-35, 43-44, 46, 50-51].

The Respondent's representative, Mr. Wulke, of the Appellate Division approved one-half of taxpayer's club expenses in addition to 100% of the club dues, to wit, \$573 of \$1,146 claimed. Furthermore, as hereinabove stated, Mr. Wulke allowed the sum of \$2,000 for the business cash disbursements claimed by the taxpayer in the sum of \$3,150. This item of business expense is completely ignored in the Memorandum Opinion of the Tax Court [Tr. pp. 12-13, 74, 78; Supp. Tr. pp. 101-103].

Following the conferences with Mr. Wulke held on October 20, November 15 and December 8, 1954, where the above mentioned business deductions were approved by Mr. Wulke in the amounts indicated, the Respondent confirmed said conferences as above set forth in his communication to the taxpayer dated March 9, 1955 [Tr. p. 10].

Travel Expense.

The only part of this claim that is inconclusive or vague or ambivalent, as characterized by Respondent's Brief, is the attempt of the Respondent to dodge his own records and acts. There is no justification for Respondent to criticize the taxpayer for not going into more detail concerning the legal matters attended to by taxpayer in connection with this disbursement. When the testimony of the taxpayer had reached this stage of the trial the noon hour had arrived. The trial started at 11:00 a.m. [Tr. p. 19]; the Court had set another case for 2:00 p.m. It was nearing 12:30 p.m. [Tr. p. 52]. The taxpayer had been told by the Court, in effect, to hurry along in the following language:

“The Court: Do we have to go into all the issues, here? All this litigation could be endless, I'm sure. All I'm interested in is how his home was used and the club was used, for these things, without telling us so much of the issues of these cases” [Tr. p. 34].

The taxpayer, therefore, heeded the admonition of the Court and did not give any testimony regarding the specific cases and legal matters that occasioned the trips to Honolulu, Boston, Phoenix, La Jolla, San Diego and Palm Springs. Taxpayer spent a total of \$7,500 for travel expense in 1952. This figure was verified by Respondent in his examination of taxpayer's checks and bills [Tr. pp. 51-52]. Taxpayer allocated \$3,500 of the total amount of \$7,500 as a reasonable portion to cover the business expense of said trips, as follows: Honolulu, \$1,500; Boston, \$1,000; all other trips \$1,000.

It is difficult for the taxpayer to comprehend the base that Respondent puts under his allowed figure of \$2,158.62

for this item of business expense. The Respondent's report, Tr. page 70, states:

“Claimed on the return: \$3,500.00. Allowed: \$2,-158.62. Added to net income \$1,341.38. The amount added to net income (1,341.38) represents one-half of the cost of \$2,682.76 of a trip to Honolulu with taxpayer's wife. Taxpayer and wife spent three weeks in Honolulu, and failed to show that the trip was conducted for business purposes. The amount of \$1,341.38 is considered to be a personal family expense for which deduction is denied under Section 24 (1) I. R. C.”

It is, therefore, apparent that the Respondent from the very beginning allowed one-half of the amount of the Honolulu trip as a business expense. Taxpayer claimed \$1,500. The Respondent allowed \$1,341.38. Under these circumstances it is certainly error for the Tax Court to hold that the Respondent disallowed the deduction of the expense incident to the Honolulu trip. At the trial, the Respondent well knowing that he had already approved the business expense of said trip in the amount of \$1,-341.38, conceded that the sum of \$1,500 was a reasonable amount to allow for this trip. For the Respondent to take the position in his Brief that no such admission was made at the trial by Respondent's attorney is mere subterfuge. The Respondent had already approved the sum of \$1,-341.38 before the trial [Tr. p. 70].

So far as the nature of the travel expenses are concerned, as questioned in Respondent's Brief, the taxpayer again reiterates that the Respondent had examined all of the bills and checks connected with this deduction, as well as all other business deductions claimed by the taxpayer, and had verified that taxpayer had spent the total sum of

\$7,500 for travel expense in 1952, and had allocated \$3,500 of said sum to business expense. How could the taxpayer know whether the Respondent allowed the expense claimed for the trip to Boston, to wit, \$1,000? The total amount allowed by the Respondent for all travel expense was \$2,158.62, which included the sum of \$1,341.38 for the Honolulu trip, leaving a balance of \$817.24 to cover all of the other trips made by taxpayer. Contrary to the statement in Respondent's Brief that the taxpayer only testified that he made a trip to Boston and New York, the record shows that taxpayer went to Boston to confer with the executives of the Liberty Mutual Insurance Company [Tr. p. 38]. Further, the record shows that in the year 1952 this particular client of the taxpayer paid the taxpayer the sum of \$5,200 [Tr. p. 25], and had paid total fees to the taxpayer in the sum of \$175,000 [Tr. p. 28]. The Respondent does not mention the Boston trip or any of the other trips and travel expense of taxpayer, except the Honolulu trip, in any of Respondent's reports, communications or notices to taxpayer, so how could the taxpayer know what was going through the Respondent's mind when he reduced this travel expense claim from \$3,500 to \$2,158.62. The same answer applies to the taxpayer's claim in the sum of \$1,000 for trips to Phoenix, Arizona, to consult with his clients Mrs. Joseph Edward Thompson, Sr., and Mr. and Mrs. Joseph Edward Thompson, Jr., and the Filor sisters who paid the taxpayer a fee of \$25,000 in the year 1952 for legal services on their behalf.

It should also be remembered that Respondent offered no evidence whatever at the trial to justify Respondent's reduction of any of the business claims made by taxpayer, including the claim for \$3,500 for travel expenses. Tax-

payer was the only witness who testified at the trial. His testimony stands uncontradicted. The Tax Court may not arbitrarily discredit the testimony of an unimpeached taxpayer so far as he testified to facts.

In the case of *Blackmer v. C. I. R.*, 70 F. 2d 257, the Court states as follows:

“A disregard of such testimony is sufficient for our holding that the taxpayer has sustained the burden of establishing his right to a reduction and error has been committed in a contrary ruling” [Pet. Tr. pp. 20, 21].

Conclusion.

The Respondent cites several cases but they do not contain the doctrine the Respondent urges on the issue of the failure of the Tax Court to make findings of fact. The two cases relied upon by Respondent disclose that the facts were found by the Tax Court in a statement of the facts which were set forth in the Memorandum Opinion, and which statement of facts were supported by the evidence as disclosed by the record. The Memorandum Opinion of the Tax Court in the taxpayer's case does not state any facts, but only conclusions. The decision of the Tax Court is, therefore, not supported by the evidence and the Tax Court has failed to make findings of fact in any form. Likewise, the cases cited by the Respondent concerning the issue of the right of Respondent to repudiate his former ruling, which was based upon his own formula in connection with the claim of the taxpayer covering the business use of his residence, do not support Respondent's contention. As hereinabove set forth, the Respondent advised the taxpayer on March 24, 1953, that the claim of the taxpayer for the years 1948, 1949 and 1950 had been allowed on the basis of a formula established by the Re-

spondent. On March 9, 1955, the Respondent advised the taxpayer that a deficiency had been determined for the year 1952 against the taxpayer in the sum of \$7,705.78 [Tr. p. 9]. The statement attached to said notice of deficiency disclosed that the Respondent had repudiated his former ruling concerning the right of the taxpayer to claim a portion of the total expense for the maintenance of his home as a business expense. The amount claimed by the taxpayer in the year 1952 was \$5,843.62, which was in line with the Respondent's formula. The Respondent reduced the amount claimed by the taxpayer to the arbitrary sum of \$750. This new ruling of the Respondent was made retroactive to the year 1952. The cases cited by the Respondent do not justify his action which reverses his former ruling retroactively. Neither was there any mistake of law or fact involved in the Respondent's former ruling covering the years 1948, 1949 and 1950 and 1951. The cases relied upon by the Respondent involved either a mistake of law or a mistake of fact, which justified the Respondent in reversing his former ruling.

The case of *Lesavoy Foundation v. Commissioner of Internal Revenue*, 238 F. 2d 589, contains a correct statement of the law which is applicable to the factual situation in the taxpayer's case. See cases cited in footnotes at pages 591, 592, 593 and 594.

Respectfully submitted,

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No. 16178 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

FRANK ANTHONY CELLINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16178
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

FRANK ANTHONY CELLINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

A. The jurisdiction of the Court of Appeals to review the judgment of the District Court herein is conferred by Title 28, United States Code, Section 1291.

B. The jurisdiction of the District Court herein is conferred by Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174.

C. The existence of jurisdiction in the District Court is shown by the allegations of the Indictment that the defendant Frank Anthony Cellino did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug which he knew had been imported into the United States contrary to law.

D. The final judgment from which this appeal is taken was entered on March 10, 1958. The defendant served and filed his notice of appeal therefrom on March 21, 1958.

II.

STATEMENT OF THE CASE.

A. Factual Statement.

On October 10, 1957, appellant was contacted by Los Angeles County Deputy Sheriff Ray Velasquez, acting as an undercover agent, through Bobby Ulrey [Rep. Tr. 35]. Ulrey stated that he would like to "pick up," *i.e.*, obtain some heroin. [Rep. Tr. 35.] Appellant said he did not have any "stuff", *i.e.*, heroin, but would take Mr. Ulrey and Deputy Velasquez to the man that did [Rep. Tr. 35]. Appellant directed the officer and Mr. Ulrey to get into Deputy Velasquez' automobile, and the appellant told Deputy Velasquez to drive to Mission and Narva Streets [Rep. Tr. 35]. When the appellant and the other two arrived at the place to which the appellant had directed them, the latter left them, saying "You guys wait here" [Rep. Tr. 35]. Immediately thereafter Velasquez and Ulrey were approached by the appellant's co-defendant, Joe Bruno, whose first words to Velasquez and Ulrey were: "How much do you guys want to pick up?" [Rep. Tr. 35]. Velasquez said he wanted an ounce of heroin and immediately Bruno and Velasquez negotiated the price of the sale [Rep. Tr. 36-37]. Velasquez paid Bruno \$100 in Federal advance funds, and further machinations called for Velasquez and Ulrey entering a drug store on Workman Street [Rep. Tr. 40-41]. The appellant was seated in the drug store when Velasquez and Ulrey entered [Rep. Tr. 41]. In response to the comment made by Velasquez that he hoped Bruno wouldn't "burn" him, *i.e.*, go away with the money and not supply narcotics or give some substance in lieu of narcotics, appellant replied that Bruno was a good man who doesn't do those kind of things, and was sure that

Bruno would return with the narcotics [Rep. Tr. 41]. Bruno did return, and gave a quantity of heroin to Velasquez in the presence of Ulrey and the appellant [Rep. Tr. 42, 16, 17].

The jury convicted appellant Cellino for selling and facilitating the sale of a quantity of heroin [Rep. Tr. 219].

B. Procedural Statement.

The Indictment charged in one count that appellant sold and facilitated the sale of a quantity of heroin on or about October 10, 1957 [Rep. Tr. 210]. Appellant's motion for acquittal at the end of the Government's case was denied [Rep. Tr. 144]. Such motion was not renewed at the end of all the evidence [Rep. Tr. 194].

III.

SUMMARY OF THE ARGUMENT.

A. Unless a motion for acquittal is made at the end of all of the evidence, the question of the sufficiency of the evidence is not open to review on appeal; in any event, the evidence sustained the verdict of the jury.

B. The evidence of the imported nature of the narcotics with respect to which the appellant was convicted, and the appellant's knowledge of that importation, was sufficient to sustain the verdict of the jury and the judgment pronounced thereon.

1. The statute violated by the appellant provides for evidence of the illegal importation of heroin, and the appellant's knowledge of such importation, by virtue of a presumption contained therein.

2. The possession required to bring the statutory presumption contained in Title 21, United States Code, Section 174 into operation need not be that of the person convicted as a result of that operation.

C. The conduct of the United States Attorney was in no manner improper, and in any event the conduct of the prosecuting attorney resulted in no prejudice to the appellant.

D. The issue of entrapment cannot be raised for the first time on appeal.

IV. ARGUMENT.

A. Unless a Motion for Acquittal Is Made at the End of All the Evidence, the Question of the Sufficiency of the Evidence Is Not Open to Review on Appeal.

In an argument entitled "No Jurisdictional Basis of the United States Court", the appellant is urging this Court to reverse a judgment of conviction rendered in the United States District Court for the Southern District of California on the grounds that such Court lacked jurisdiction to render the judgment or impose sentence thereon. Appellant does not urge that the District Court did not have jurisdiction over the person of the appellant, since the record of the trial indicates his presence in court [Rep. Tr. 4]; nor does the appellant urge that the District Court lacks subject matter jurisdiction over the offense charged against the appellant, since the Supreme Court of the United States, in *Brolin v. United States*, 236 U. S. 216 (1915) points out that the power of the Federal Government to punish narcotics offenses in the Courts of the United States is based upon the power delegated to Congress by the Constitution to regulate interstate and foreign commerce. *United States v. Ah Hung*, 243 Fed. 762 (2d Cir. 1917) further provides that no matter how far removed one is from the importation as-

pect, the United States Courts still retain the jurisdiction granted them by the Commerce Clause of the Constitution of the United States. Therefore, when the appellant argues that there is no jurisdiction in the District Court, he is arguing that jurisdictional facts were not proven, that no importation of narcotics was shown as it related to the appellant, that the evidence was insufficient to support the verdict.

Before the appellant can ask this Court to review the judgment and sentence of the District Court on the grounds of insufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

“ . . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.”

In the instant case, a motion for acquittal was made by the appellant at the termination of the Government's case [Rep. Tr. 144]. Such motion was denied after oral argument [Rep. Tr. 151]. Thereafter the appellant put on evidence, and did not renew his motion for acquittal at the termination of all of the evidence [Rep. Tr. 194]. By offering evidence after a motion for acquittal has been

denied, the appellant waived the right to have the sufficiency of the evidence considered on appeal.

Mosca v. United States, 174 F. 2d 448 (9th Cir. 1949);

Maulding v. United States, 257 F. 2d 56 (9th Cir. 1958);

Paine v. United States, 7 F. 2d 263 (9th Cir. 1925);

Mitchell v. United States, 23 F. 2d 260 (9th Cir. 1927).

The Eighth Circuit, in addressing itself to this point, spoke in apposite language in *Leeby v. United States*, 192 F. 2d 331 (8th Cir. 1951) at page 333:

“We shall first refer to the claim of error in denying defendant’s motion for acquittal interposed at the close of the government’s case. It is observed that after this motion was interposed and denied at the close of the government’s case, defendant offered testimony and himself testified in his own behalf. He did not renew this motion at the close of all the evidence. Defendant was entitled to offer evidence in his defense notwithstanding the fact that he had interposed a motion for acquittal at the close of the government’s testimony but by so doing he waived his objection to the ruling of the court in denying his motion and his right to allege this ruling as error, and defendant not having interposed a motion for judgment of acquittal at the close of all the testimony, we cannot now consider the question of the sufficiency of the evidence to sustain the judgment and sentence of conviction.”

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as *Alberty v. United States*, 91 F. 2d 461 (9th Cir. 1937) and *Bruno v. United States*, 259 F. 2d 8 (9th Cir. 1958) wherein this Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a manifest injustice, but feels that no injustice here would result, and hence the reasoning of *United States v. Mosca*, *supra*, and the cases in line with it, is applicable.

And in any event, the evidence was sufficient to support the judgment and sentence. Ulrey told the defendant that he would like to “pick up”, *i.e.*, obtain heroin [Rep. Tr. 35]. The appellant stated that he didn’t have any “stuff”, *i.e.*, heroin, but would take Ulrey and Velasquez to the man that did [Rep. Tr. 35]. Thereafter the appellant directed the activities of Velasquez and Ulrey, and accompanied them to a spot where a liaison could be made with a person who had heroin to sell [Rep. Tr. 35]. The appellant directed Velasquez and Ulrey to wait and left them [Rep. Tr. 35]. Immediately thereafter Bruno appeared on the scene and his first words, upon coming upon Velasquez and Ulrey were “How much do you guys want to pick up?” [Rep. Tr. 35]. From these facts the jury could infer that the appellant found willing buyers for heroin, brought the buyers to a given place, accompanied them to that place, directed them to wait, sought out the seller, and informed him where buyers for heroin could be located. Further, appellant’s presence at the time the heroin was being delivered, knowing that that delivery was taking place, further emphasizes his participation in the transaction which led to his conviction.

B. The Evidence of the Imported Nature of the Heroin With Respect to Which the Appellant Was Convicted, and the Appellant's Knowledge of That Importation, Was Sufficient to Sustain the Verdict of the Jury and the Judgment Pronounced Thereon.

1. The Statute Violated by the Appellant Provides for Evidence of the Illegal Importation of Heroin, and the Appellant's Knowledge of Such Importation, by Virtue of a Presumption Contained Therein.

The appellant contends that the judgment of the Court below should be reversed because the heroin in connection with which the appellant was convicted was not shown to have been imported at all, much less illegally, nor was a showing made that the appellant knew such narcotics to have been imported. With respect to this contention, it becomes necessary to look to the language of the statute here violated. Section 174 of Title 18 of the United States Code reads in pertinent part as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .

“Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be

deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Thus it can be seen that the words ". . . possession shall be deemed sufficient evidence to authorize conviction . . ." provides the necessary proof not only of the illegal importation of the heroin here in question, but also the appellant's knowledge of that importation.

Yee Hem v. United States, 268 U. S. 178 (1925).

The statutory presumption that heroin was illegally imported and that the person in possession of such heroin knew of the illegal importation has been repeatedly sustained.

Hooper v. United States, 16 F. 2d 868 (9th Cir. 1926);

Stopelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. den. 340 U. S. 864;

United States v. Moe Liss, 105 F. 2d 144 (2d Cir. 1939);

United States v. Feinberg, 123 F. 2d 425 (7th Cir. 1941), cert. den. 315 U. S. 801;

Howard v. United States, 75 F. 2d 562, (7th Cir. 1935);

Frank v. United States, 37 F. 2d 77 (8th Cir. 1929).

2. The "Possession" Required to Bring the Statutory Presumption Contained in Title 21, United States Code, Section 174 Into Operation Need Not Be That of the Person Convicted as a Result of That Operation.

Appellant concedes the validity of the statutory presumption contained in 21 United States Code, Section 174 as it applies to his co-defendant, Joe Bruno, but takes the position that such presumption should not flow to him because he was never shown to have been in possession of the heroin in question. However the weakness in appellant's position can be found by reference to Title 18, United States Code, Section 2, which reads:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The Courts of the Second and Seventh Circuits have addressed themselves to the issue of the "possession" required of an aider and abettor to invoke the statutory presumption contained in 21 United States Code, Section 174. In *United States v. Cohen*, 124 F. 2d 164 (2d Cir. 1941), cert. den. 315 U. S. 811, the Court said:

"Under the first statute we have quoted [21 U. S. C. 174] it was only necessary to show possession of the narcotics to establish guilt and under the second statute [18 U. S. C. 2], making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental."

This language was quoted with approval by the Court in *United States v. Chiarelli*, 192 F. 2d 528 (7th Cir.

1951), cert. den. 342 U. S. 913. The record of the court below indicates clearly that appellant's co-defendant, Joe Bruno, was in possession of heroin incident to a transaction the consummation of which the appellant aided and abetted, [Rep. Tr. 16, 17, 35, 41, 42]. In this regard one may be charged in an indictment as a principal and convicted as an aider and abettor, as this Court has held in *Nye and Nisson v. United States*, 168 F. 2d 846 (9th Cir. 1948), affirmed 336 U. S. 613.

There is a further difficulty with the appellant's contention that the judgment of the trial court should be reversed because the appellant was not shown to have been in possession of the heroin in question. This difficulty arises from the nature of the indictment, which charges that the appellant and his co-defendant, Joe Bruno:

“ . . . after importation, did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely: approximately 83 grains of heroin, to Ray Velasquez, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law.”

Thus it can be seen that the appellant is charged with selling and *facilitating the sale* of the charged quantity of heroin.

In construing the meaning of the term “facilitate” as used in Title 21, United States Code, Section 174, this court has said on *Pon Wing Quong v. United States*, 111 F. 2d 751 (9th Cir. 1940) at page 756:

“Since the term ‘facilitate’ seems not to have any special legal meaning, the framers of this statute must have had in mind the common and ordinary

definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.'"

This Court has further stated, in *Brown v. United States*, 222 F. 2d 293 (9th Cir. 1955) that one need not have possession of heroin in order that he be convicted of facilitating the sale of that heroin.

In support of his contention with respect to the fact that the statutory presumption ought not to be applicable to the appellant since he was never shown to have been in possession of heroin, he relies heavily on *Willsman v. United States*, 286 Fed. 852 (8th Cir. 1923). He also relies on *Kalos v. United States*, 9 F. 2d 268 (8th Cir. 1925) and *Adams v. United States*, 220 F. 2d 297 (5th Cir. 1955).

The *Willsman* case dealt with a prosecution for the purchase by Willsman and his co-defendant Grant of a quantity of morphine sulphate otherwise than from the original stamped package containing the same. There was a statutory presumption in point in the *Willsman* case which read:

"... the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found."

In construing the above quoted section of the Harrison Anti-Narcotic Act, the court held, under the facts of that case, that possession by a co-defendant was insufficient to raise the statutory presumption quoted above. However, the statutory presumption applicable to the appel-

lant is entirely different, and hence the *Willsman* case provides no precedent in the construction of the statutory presumption contained in 21 United States Code, Section 174. This is further shown by looking to certain language in the *Willsman* case itself, where it was said at page 855:

“If the matter before us was upon an indictment charging an unlawful sale by the defendants, the evidence would undoubtedly tend to show Grant to be a principal in fact, and Willsman a principal in law, because aiding and abetting in the sale; but the section of the statute making an abettor a principal has no application to the matter now under consideration.”

Thus it can be seen that under the authority relied on by the appellant, appellant charged with the sale of heroin, would be liable as an aider and abettor.

Appellant also relies on *Kalos v. United States*, 9 F. 2d 268 (8th Cir. 1925) to the effect that the Government must prove knowledge of unlawful importation. The case of *Frank v. United States*, 37 F. 2d 77 (8th Cir. 1929), in construing the effect of the *Kalos* case, indicated that the *Kalos* case held as it did because possession with the knowledge on the part of the defendant that the substance possessed was a narcotic drug was not proved, and hence the effect of the presumption contained in 21 U. S. C. 174 was not discussed in the *Kalos* case.

The appellant cites *Adams v. United States*, 220 F. 2d 297 (5th Cir. 1955). That case dealt with whether or not there was proof that the defendant sold heroin, since the indictment in the *Adams* case did not charge that the defendant facilitated the sale of heroin, only that the de-

fendant sold heroin. Here, where the allegations of the indictment show a facilitation of sale rather than a sale, the *Adams* case does not support the appellant's position.

C. The Conduct of the United States Attorney Was in No Manner Improper, and in Any Event the Conduct of the Prosecuting Attorney Resulted in No Prejudice to the Appellant.

Appellant contends that the United States Attorney asked improper questions calculated to inflame and prejudice the jury. He admits the United States had the right to show to the jury that the appellant had committed a felony in the past, since this went to impeach his credibility as a witness. However, appellant alleges that United States Attorney went further than this, that he insisted the appellant tell the jury where he met Bobby Ulrey, to wit, San Quentin prison. With respect to the questions regarding where the defendant had met Ulrey, it may be noted that these were received into evidence without objection on the part of the appellant. The only objection raised on the subject of inquiry into appellant's prior incarceration in San Quentin prison was an objection to the question how long has it been since appellant had been in San Quentin. Which was overruled. Since the relationship between appellant and Mr. Ulrey was in issue and since United States had the right to show the appellant had been convicted of a felony prior to the time of this indictment was brought against him, it is submitted that there is no error in allowing the testimony with respect to the prior incarceration in San Quentin to come into evidence. *Morgan v. United States*, 98 F. 2d 473 (8th Cir. 1938), cert. denied 305 U. S. 648, reh. denied 305 U. S. 674; *Vedin v. McConnell*, 22 F. 2d 753 (9th Cir. 1927).

It is also argued by appellant that there was prejudicial misconduct on the part of the United States Attorney when he asked "what were the circumstances involved in this assault with a deadly weapon" following an admission of another prior felony conviction. To this question the appellant objected and the objection was sustained, so that no details of the offense were put before the jury. However, appellant did not ask for a charge that the jury disregard the question, nor did appellant make a motion for a mistrial. He chose rather to gamble on the verdict, and since it was not favorable to him, he now raises the issue of misconduct. Without a motion for a mistrial an appeal based upon misconduct is waived. *Jenkins v. United States*, 251 F. 2d 51 (5th Cir. 1958). To the same effect is the case of *Harris v. United States*, 261 F. 2d 897 (9th Cir. 1959), which case said at page 902:

"In *Alberty v. United States*, 9 Cir., 1937, 91 F. 2d 461, 463, the assignments of error raised questions as to the propriety of Government counsel's conduct. The Court stated at Page 463: 'Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there is none in claiming it against the prosecutor. It should be made at once. The Court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the Court and jury, in an extended trial and, without objection or motion for relief, raise such questions on appeal.' The same view was expressed in *Powell v. United States*, 9 Cir. 1929, 35 F. 2d 941."

Further this Court has held in *Kasper v. United States*, 225 F. 2d 275 (9th Cir. 1955) that the asking of improper questions by the prosecuting attorney does not necessarily affect the fairness of the trial.

D. The Issue of Entrapment Cannot Be Raised for the First Time on Appeal.

Appellant next asserts that any evidence introduced by the United States from testimony given by Deputy Velasquez was illegally obtained because Deputy Velasquez had induced the entire transaction. What appellant is really trying to do here is to raise the issue of entrapment for the first time on appeal. Although couching his argument in the terms of illegally obtained evidence he argues in his opening brief that the transportation of the appellant from the point where Ulrey and Velasquez first met appellant to the point where Ulrey and Velasquez met the co-defendant Bruno was induced by Deputy Sheriff Velasquez and that without this all-important transportation of the appellant by the witness for the United States there would have been no crime. He argues that this vital element was done by the agent of the United States contrary to law and established cases, where the United States agent acted illegally the evidence so obtained is illegal and inadmissible. This argument merely attempts to put before this Court the issue of entrapment. This issue was not before the trial court, no instructions were given on the issue of entrapment, none were requested by this appellant, and no objection was raised to the fact that no entrapment instructions were given. According to *United States v. Ginsburg*, 96 F. 2d 882 (7th Cir. 1938), cert. denied 305 U. S. 620, no issue of entrapment can be raised if no instructions were requested on entrapment or no objection raised to the fact that entrapment instructions were not given.

However, if this Court wishes to consider the point, its lack of substance is readily apparent. *Sorrells v. United States*, 287 U. S. 435 (1932) remains the leading case on the subject of entrapment, stating that artifice and stratagem may be employed to catch those engaged in criminal enterprises, that if the crime begins in the mind of the defendant, not in the mind of the agents of the United States, there is no entrapment. Further the *Sorrells* case shows that if a defendant seeks acquittal on the basis that he was entrapped into the commission of crime he must subject himself into a searching inquiry into his own conduct and pre-dispositions, toward the commission of the crime charged, since entrapment is a question of fact for the jury. In the case at bar, since no claim was made at the trial that the defendant was entrapped into the commission of the offense for which he was convicted, there was no opportunity to investigate the background of the defendant in order to see whether or not he was predisposed to commit the crime, or whether or not the crime originated in his mind or in the mind of those charged with the enforcement of Federal laws. This Court has said in *Trice v. United States*, 211 F. 2d 513 (9th Cir. 1954) at page 516:

“The people’s fight through the Government against the use of narcotics is a desperate and continuous one. So great is the menace that the hiring of disreputable persons to act with the narcotics agent in deceit and by despicable methods to catch distributors of the ‘stuff’ has been sanctioned by the highest Courts as the only successful manner to combat the evil . . .

“Here is entrapment in fact . . . the question is: Is it illegal entrapment and the answer to that ques-

tion is to be found in the testimony of the narcotics agents on whether they had reasonable grounds to believe that Trice was predisposed to engage in the illicit traffic.”

Since the issue of entrapment was not raised below there was no inquiry as to whether or not the narcotics agents had reasonable grounds to believe that appellant was predisposed to engage in the illicit sale of narcotics. Therefore the point cannot now be urged for the first time that as to this appellant the Government engaged in illegal activities in order to secure his arrest.

United States v. Ginsburg, supra.

V.

CONCLUSION.

1. The appellant, by failing to make a motion for acquittal at the end of all of the evidence, has waived the right to assert the insufficiency of the evidence of jurisdictional facts.

2. It is clear that the appellant aided and abetted, and facilitated the sale of heroin by the co-defendant Bruno to Deputy Velasquez. Since possession was proved as to Bruno, the consequences of such possession flow to the appellant who aided and abetted, and facilitated the transaction to which that possession was incidental.

3. The conduct of the prosecuting attorney was proper, and if the appellant had wished to preserve any alleged improprieties for review, he should have requested a charge that the jury disregard the questions, or move for a mistrial.

4. There is no showing that the defendant was entrapped. Further, the issue of entrapment was never placed before the jury. Therefore the Government respectfully requests that the judgment of conviction of the trial court be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

*Assistant United States Attorney,
Chief, Criminal Division,*

LOYD W. REED,

*Assistant United States Attorney.
Attorney for Appellee.*



No. 16179 ✓

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant.

vs.

DAN T. KENNEDY,
Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILE

MAR 26 1959

PAUL P. O'BRIEN,



No. 16179

**United States
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Appellant.
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DAN T. KENNEDY,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

PERRY W. NORTON,
Asst. Attorney General;

ROGER P. MARQUIS,
A. DONALD MILEUR,
Dept. of Justice,
Washington 25, D. C.;

WILLIAM T. PLUMMER,
U. S. Attorney,
Anchorage, Alaska,
For Appellant.

DAVIS, HUGHES & THORSNESS,
Box 477,
Anchorage, Alaska,
For Appellee.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6885

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, Situate in Nenana Recording Precinct, Fourth Division, Territory of Alaska, and DAN T. KENNEDY, DUKE E. STUBBS, MRS. ELIZABETH S. STUBBS and All Other Persons or Parties Unknown Claiming Any Right, Title, Estate, Lien or Interest in the Real Estate Described Herein,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is "Act approved August 1, 1888 (C. 728, pars. 1 and 2, 25 Stat. 357) as amended (62 Stat. 986; 40 U.S.C. 1946 ed., Supp. II, Sec. 257)" and "Chapter VII, Public Law 759, 81st Congress."

3. The use for which the property is to be taken is as a part of Mount McKinley National Park, Alaska, within which exterior boundaries it is now located.

4. The interest to be acquired in the property is an estate in fee simple.

5. The property so to be taken is in the Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is more particularly described as follows:

Tract A: The south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing five acres, according to the Official Plat of Survey of the said land, on file in the Bureau of Land Management;

Tract B: The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$); the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of the said land, on file in the Bureau of Land Management,

together with all buildings and improvements, if any, all appurtenances thereto, and all interests

therein, as shown on the plat attached hereto and by this reference made a part hereof.

6. The persons known to the plaintiff to have or claim an interest in the property are:

Tract A (as described in paragraph 5)—Dan T. Kennedy.

Tract B (as described in paragraph 5)—Duke E. Stubbs, Mrs. Elizabeth S. Stubbs.

7. In addition to the persons named, there are or may be others who have or claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation “Unknown Owners.”

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

.....,
United States Attorney;
/s/ HUBERT A. GILBERT,
Asst. U. S. Attorney.

[Endorsed]: Filed September 6, 1951.

[Title of District Court and Cause.]

ORDER DIRECTING PUBLICATION
OF NOTICE

Now, on this 2nd day of November, 1951, this matter coming on for hearing on plaintiff's Motion for an Order for service of Notice herein by publication; and

It appearing to the court that the plaintiff has good cause of action against the defendants, known and unknown, named in the title of this cause hereinabove set forth; and,

That Jessen's Weekly is a weekly newspaper of general circulation and regularly published at Fairbanks, Alaska, and the most likely to give notice to the defendants;

Now, Therefore, It Is Hereby Ordered that notice herein be served upon the said defendants, and each of them, by publishing the same in said Jessen's Weekly once each week for four consecutive weeks, commencing with the issue of November 8th, 1951, as well as by forthwith mailing a copy of said Notice and Complaint to each of the defendants whose place of residence is known, in the United States Post Office at Fairbanks, Alaska, postage prepaid, directed to each of said defendants at his place of residence as shown in the Affidavit supporting the plaintiff's Motion upon which this Order is based.

Done at Fairbanks, Alaska, this 2nd day of Nov.,
1951.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed November 2, 1951.

[Title of District Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
DAN T. KENNEDY

Comes now Dan T. Kennedy, one of the above-named defendants, and for himself as the owner of Tract A described in plaintiff's complaint, but not for his co-defendants, in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first paragraph of plaintiff's complaint.

II.

Defendant admits that this action is commenced under what is now known as Title 40, U. S. Code, Section 257. Defendant has no knowledge or information concerning the other allegations of the second paragraph of plaintiff's complaint and therefore denies each and all of such allegations.

III.

Defendant admits that the property in question owned by Defendant, Dan T. Kennedy, is located

within the exterior boundaries of Mount McKinley National Park, Alaska, and denies each and all the other allegations of the third paragraph of plaintiff's complaint.

IV.

Defendant admits that his estate in the property in question is a fee simple estate. Defendant has no knowledge or information sufficient to form a belief concerning the interest in such property which is sought to be acquired by the plaintiff, and therefore denies each and all the other allegations of the fourth paragraph of the plaintiff's complaint.

V.

The defendant, Dan T. Kennedy, admits that the property owned by him and described in plaintiff's complaint as Tract A is located in Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is described as set forth in the fifth paragraph of plaintiff's complaint. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the fifth paragraph of plaintiff's complaint, and, therefore, denies each and all of such allegations.

VI.

Defendant Dan T. Kennedy alleges that he is the owner in fee simple of Tract A as described in paragraph six of plaintiff's complaint. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the sixth paragraph of plaintiff's complaint and, therefore, denies each and all of such allegations.

VII.

Defendant Dan T. Kennedy alleges that there are no other owners or claimants of the property described as Tract A in plaintiff's complaint save and except the defendant, Dan T. Kennedy. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the seventh paragraph of plaintiff's complaint and, therefore, denies each and all of such allegations.

As a further answer to plaintiff's complaint and by way of affirmative defense thereto, defendant alleges as follows:

I.

That the property described as Tract A in paragraph five of plaintiff's complaint was acquired by defendant, Dan T. Kennedy, more than twenty years ago as his home and as a headquarters site for operation of defendant's business as a big game guide and as a trapper and as a headquarters for certain mining operations contemplated by the defendant and that defendant used and occupied such land for those purposes until excluded therefrom by the plaintiff as hereinafter more fully set forth.

II.

That thereafter and without his knowledge and consent and against the wishes of the defendant, Dan T. Kennedy, Tract A owned by such defendant was included within the boundaries of Mount McKinley National Park when the boundary lines of such park were extended.

III.

That thereafter Defendant, Dan T. Kennedy, was prevented from carrying on his business from his property as above set forth by direction of various officials of the National Park and Service, and that defendant was forced to vacate the premises and move his home elsewhere.

IV.

That the property owned by defendant, Dan T. Kennedy, and sought to be condemned by this action is East of the Alaska Railroad and outside of the area which has been used by Mount McKinley National Park and as defendant, Dan T. Kennedy, believes and so alleges such property is actually not a part of Mount McKinley National Park and is not necessary for the use or benefit of such National Park and that there is no reason at all for defendant's property to be taken for the uses set forth in plaintiff's complaint.

Wherefore, having fully answered plaintiff's complaint defendant prays that plaintiff take nothing thereby and that defendant have and recover of and from the plaintiff costs and damages and that defendant may have all other relief provided by law in the premises.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,

Attorneys for the Defendant,
Dan T. Kennedy.

A jury trial in the above-entitled matter is hereby demanded.

DAVIS & RENFREW,

By /s/ EDWARD V. DAVIS,
Attorneys for Defendant,
Dan T. Kennedy.

Duly verified.

[Endorsed]: Filed November 19, 1951.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the plaintiff in the above-entitled action and moves this Honorable Court to strike from the separate answer of the defendant, Dan T. Kennedy, all of paragraph IV on the ground that where land is taken pursuant to an Act of Congress, the administrative determination of the agency at whose request the property is being required is not subject to judicial review.

Dated at Fairbanks, Alaska, this 18th day of January, 1952.

/s/ HUBERT A. GILBERT,
Assistant United States Attorney, Attorney for
Plaintiff.

[Endorsed]: Filed January 18, 1952.

[Title of District Court and Cause.]

ORDER

The Government was represented by Hubert A. Gilbert, Asst. U. S. Attorney; the defendant was not represented.

Mr. Gilbert had argument on * the Government's motion to strike from the answer of defendant Kennedy.

It was ordered that the motion be granted.

* * *

Entered March 7, 1952.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled cause, the United States of America, demands a trial of the cause by jury.

/s/ EVERETT W. HEPP,
United States Attorney.

[Endorsed]: Filed August 26, 1952.

[Title of District Court and Cause.]

MOTION TO SET FOR TRIAL

Comes now the complainant in the above-entitled cause and represents to the court that said cause is now at issue and ready to be set for trial, and moves this Honorable Court for a day certain for the trial of said cause.

This motion is based on the files and records herein.

Dated at Fairbanks, Alaska, this 10th day of December, 1952.

/s/ R. J. McNEALY,
United States Attorney.

[Endorsed]: Filed December 12, 1952.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed between R. J. McNealy, attorney for plaintiff, and Edward V. Davis, of the firm of Davis, Renfrew and Hughes, attorneys for defendant, Dan T. Kennedy, that the above-entitled cause be set in the month of October, 1953, for trial, or such date that may be agreeable to the parties hereto and the Court.

Dated this 13th day of February, 1953.

/s/ R. J. McNEALY,
United States Attorney,
Attorney for Plaintiff.

DAVIS, RENFREW AND
HUGHES,

By /s/ EDWARD V. DAVIS,
Attorney for Defendant,
Dan T. Kennedy.

[Endorsed]: Filed February 19, 1953.

[Title of District Court and Cause.]

MOTION TO REMOVE FROM
TRIAL CALENDAR

Comes now the attorney for the Government, Theodore F. Stevens, and moves this Honorable Court for an order removing the above-entitled cause from the trial calendar for the reason that settlement negotiations are presently pending between the plaintiff and the attorney for the defendant, Dan T. Kennedy.

Dated at Fairbanks, Alaska, this 22nd day of March, 1955.

/s/ THEODORE F. STEVENS,
United States Attorney.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

ORDER TO REMOVE FROM
TRIAL CALENDAR

This matter coming on regularly for hearing upon the motion of Theodore F. Stevens, United States Attorney, for an order removing the above-entitled cause from the trial calendar, and it appearing to the Court that settlement negotiations are presently pending between the plaintiff and the attorney for the defendant Dan T. Kennedy, now therefore:

It Is Ordered that the above-entitled matter be, and the same is hereby, removed from the trial calendar.

Dated at Fairbanks, Alaska, this 23rd day of March, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered March 23, 1955.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF PLACE
OF TRIAL

Comes Now Dan T. Kennedy, one of the above-named defendants and moves that the place of

trial of the above-entitled action may be changed from Fairbanks in the Fourth Judicial Division of the Territory of Alaska to Anchorage in the Third Judicial Division of the Territory of Alaska for the reason that the convenience of the witnesses and the ends of justice would be promoted by such change and for the reason that the defendant Dan T. Kennedy, at all times here in question has resided at Anchorage in the Third Judicial Division of the Territory of Alaska and now so resides at that place and for the reason that considering available means of travel the defendant, Dan T. Kennedy, will be put to unnecessary expense and inconvenience if required to appear at Fairbanks, the place in which the action has been commenced, for the trial of this matter.

This motion is based on all the records and files of this action and on the affidavit of Dan T. Kennedy, one of the above-named defendants.

DAVIS, RENFREW &
HUGHES,

By /s/ EDWARD V. DAVIS,
Attorneys for the Defendant,
Dan T. Kennedy.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Dan T. Kennedy, being first duly sworn, upon his oath deposes and says:

That he is the Dan T. Kennedy named as one of the defendants in the above-entitled action. That he is the owner of certain property described as Tract "A" in plaintiff's complaint on file in this action and that he has been the owner of such property since he received patent thereto more than twenty (20) years ago. That the property involved in this matter is located near McKinley Park Station on the Alaska Railroad approximately equidistant between Anchorage, Alaska and Fairbanks, Alaska. That affiant has resided at Anchorage, Alaska, for more than ten (10) years last past and for a considerable period of time prior to the commencement of this action in the month of September of 1951. That all of defendant's witnesses reside at Anchorage, Alaska, or in that vicinity. That defendant is over eighty (80) years of age and frequently requires medical attention. That defendant has limited means and that it would cause unnecessary hardship upon the defendant to require him to transport himself and his witnesses to and from Fairbanks, Alaska, for the trial of this matter and to maintain himself and his witnesses at Fairbanks,

Alaska, while engaged in the trial of the matter. That as will appear from the records and files of this matter, the United States of America is attempting to acquire defendant's property by condemnation. That if defendant is required to go to Fairbanks, Alaska, to defend the above-entitled matter and if he is required to have his witnesses at such place that the cost of such transportation and of maintaining defendant and his witnesses at Fairbanks, Alaska, would in effect seriously cut down the amount of money which would remain net to the defendant upon determination of the value of the property in the event the Court should decide to allow the requested condemnation of defendant's property and would in effect amount to a taking of defendant's property without just compensation therefor. That the plaintiff in this action and its agents at all times have known that the defendant, Dan T. Kennedy, was a resident of Anchorage, Alaska, and that a trial of this matter at Fairbanks, Alaska, would seriously hinder the defendant in making his defense to such action and as defendant is informed and believes and so alleges the fact to be the action was commenced at Fairbanks, Alaska, rather than at Anchorage, Alaska, for the specific purpose of causing the defendant, Dan T. Kennedy, unnecessary expense or inconvenience. That as affiant is informed and believes and so alleges the fact to be it is just as convenient for the plaintiff's witnesses to meet at Anchorage, Alaska, as it is for them to meet at Fairbanks, Alaska, and that the matter can be handled in Anchorage,

Alaska, by the District Attorney at that place or at the option of the Government by the District Attorney of the Fourth Division of the Territory of Alaska and for that reason trial of the matter at Fairbanks would cause unnecessary expense and inconvenience to the defendant without corresponding benefit to the Government as plaintiff. That for the foregoing reasons affiant believes that the convenience of witnesses, including affiant and the ends of justice would be promoted by changing the place of trial from Fairbanks, Alaska, to Anchorage, Alaska, as prayed in defendant's motion.

/s/ DAN T. KENNEDY.

Subscribed and sworn to before me this 14th day of April, 1955.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public for Alaska.

My commission expires: 11/7/1958.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

ORDER

The Government was represented by Theodore F. Stevens, U. S. Attorney, the defendant was neither present nor represented.

On the Motion of Mr. Stevens, it was Ordered that this cause be removed from the calendar, pending further negotiations.

Entered September 9, 1955.

[Title of District Court and Cause.]

STIPULATION

Whereas, the default of the defendants herein was entered upon the 25th day of August, 1952, for failure to answer or otherwise plead, and

Whereas Duke E. Stubbs died in 1939, and by will filed in the State of Washington January 31, 1940, said Duke E. Stubbs bequeathed and devised his entire estate to Mrs. Elizabeth S. Stubbs, with the exception of One Dollar (\$1.00) each to the children of Duke E. Stubbs, and

Whereas Mrs. Elizabeth S. Stubbs died on the 13th day of September, 1954, in the State of New York, leaving a last will and testament, which has been duly probated in the Surrogate's Court of the State of New York, County of Bronx, and letters testamentally filed in said Court on the 3rd day of March, 1955, a copy of which is attached to this stipulation, and

Whereas Mary E. Weiss, the executrix of the estate of Mrs. Elizabeth S. Stubbs, is desirous of entering into a settlement in regard to the interest of Mrs. Elizabeth E. Stubbs and the property described in the complaint herein, including the interest of Mrs. Elizabeth E. Stubbs, which was obtained pursuant to the will of Duke E. Stubbs, as aforesaid.

It Is Therefore Hereby Stipulated that judgment be entered in the amount of Four Thousand

(\$4,000.00) inclusive of interest as just compensation for Tract B, to wit, the property described as belonging to Duke E. Stubbs and Mrs. Elizabeth S. Stubbs in the complaint herein filed on September 6, 1951; and that neither party be awarded costs in this action.

Dated at New York, N. Y., this 6th day of February, 1956.

/s/ MARY E. WEISS,
Executrix of Estate
of Mrs. Elizabeth E. Stubbs.

Subscribed and sworn to before me this 6th day of February, 1956.

/s/ ROBERT SHAPIRO,
Commissioner of Deeds, City of New York, Bronx
Co. Clk's No. S-38-56, Reg. No. 6-5-24, N. Y.
Co. Clk's No. 152, Reg. No. 6-S-46.

Commission expires September 20, 1956.

/s/ BERNSTEIN & SHAPIRO,
Attorneys for Mary E. Weiss.

Dated at Fairbanks, Alaska, this 16th day of February, 1956.

/s/ THEODORE F. STEVENS,
United States Attorney.

No. 30901

The People of the State of New York, to all to
whom these presents shall come or may concern,

Send Greeting:

Know Ye, That we, having inspected the Records of our Surrogate's Court in and for the County of Bronx, do find that on the 1st day of March in the year one thousand nine hundred and fifty-five, by said Court, Letters Testamentary on the estate of Elizabeth S. Stubbs, late of the County of Bronx, deceased, were granted unto Mary E. Weiss, of the County of Westchester the Executrix named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of Bronx to be hereunto affixed.

Witness, Hon. Christopher C. McGrath, Surrogate of our said County, in The City of New York, the 3rd day of March, in the year of our Lord one thousand nine hundred and fifty-five.

/s/ JOHN J. SULLIVAN,
Clerk of the Surrogate's
Court.

[Endorsed]: Filed February 17, 1956.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 6885 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, SITUATE IN NENANA
RECORDING PRECINCT, FOURTH DIVI-
SION, TERRITORY OF ALASKA, and DAN
T. KENNEDY, DUKE E. STUBBS, MRS.
ELIZABETH S. STUBBS and ALL OTHER
PERSONS OR PARTIES UNKNOWN
CLAIMING ANY RIGHT, TITLE, ESTATE,
LIEN OR INTEREST IN THE REAL ES-
TATE DESCRIBED HEREIN,

Defendants.

JUDGMENT AS TO TRACT "B"

This matter coming before the Court on the
Stipulation of Mary E. Weiss, Executrix of the
estate of Mrs. Elizabeth S. Stubbs, the sole owner
of Tract "B," described herein, as a result of the
will of Duke E. Stubbs, said Stipulation being
entered into by the plaintiff through its attorney,
the United States Attorney, and said Stipulation
providing that Four Thousand Dollars (\$4,000.00)
shall be just compensation for Tract "B," and

Whereas the default of Duke E. and Elizabeth S.
Stubbs was duly entered by this Court on the 25th
day of August, 1952, after said defendants were

duly and regularly served with notice by publication,

It Is Now Hereby Ordered, Adjudged and Decreed that

1. The United States pursuant to this Judgment shall have an estate in fee simple for the purposes and pursuant to the authority set forth in the complaint herein in the following property, to wit:

The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$), the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$), of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of the said land, on file in the Bureau of Land Management.

2. The United States shall pay to Mary E. Weiss as just compensation for the tract described above, the amount of Four Thousand Dollars (\$4,000.00) inclusive of interest and the Court hereby expressly approves the Stipulation by the parties herein.

3. The United States has the right and authority to take said land pursuant to the acts of Congress set forth in the complaint herein and the use for which said property has been taken is for public use, to wit, said property is now a part of the Mount McKinley National Park.

4. No costs or attorneys' fees shall be awarded to either party to this action.

Done at Fairbanks, Alaska, this 24th day of February, 1956.

/s/ VERNON D. FORBES,
District Judge.

Lodged February 24, 1956.

[Endorsed]: Filed and entered February 27,
1956.

[Title of District Court and Cause.]

CLERK'S RECEIPT

I, John B. Hall, Clerk of the United States District Court for the Fourth Judicial Division, District of Alaska, do hereby certify that on the 2nd day of April, 1956, I received from the United States of America, plaintiff, herein, and deposited in the Registry of the Court, the sum of Four Thousand Dollars (\$4,000.00), pursuant to the Judgment as to Tract "B" hereinbefore entered confirming the awards as to Tract "B" in the above-entitled condemnation proceeding.

Dated at Fairbanks, Alaska, this 2nd day of April, 1956.

[Seal] /s/ JOHN B. HALL,
Clerk.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

NOTICE OF HEARING

To the Defendants Above Named and to Davis, Renfrew and Hughes, His Attorneys:

You, and Each of You, Will Please Take Notice that the Motion for Change of Place of Trial will be called on for hearing in the court room of the above-entitled Court at Fairbanks, Alaska, on the 16th day of November, 1956, at the hour of 1:30 p.m. on said day, or as soon thereafter as counsel can be heard.

Dated at Fairbanks, Alaska, this 5th day of November, 1956.

/s/ GEORGE M. YEAGER,
United States Attorney.

[Endorsed]: Filed November 6, 1956.

[Title of District Court and Cause.]

ORDER FOR CHANGE OF VENUE

Defendant, Dan T. Kennedy, having heretofore filed a motion for change of place of trial to the above-entitled cause to the District Court for the Third Division of the Territory of Alaska, and the United States having settled the matter except as

to the defendant Dan T. Kennedy and making no objection to the motion:

Now, Therefore, It Is Hereby Ordered and Adjudged that the above-entitled matter shall be transferred for trial to the District Court for the Third Division, Territory of Alaska.

The Clerk of this Court is hereby directed to forward the records and files in this matter to the Clerk of the District Court for the Territory of Alaska, Third Division for further proceedings in that Court.

Done at Fairbanks, Alaska, this 16th day of November, 1956.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered November 16, 1956.

[Title of District Court and Cause.]

MINUTE ORDER IN RE TRIAL DATE

Upon the motion of Edward V. Davis, It Is Ordered that the above cause be ready for trial upon 60 days' notice.

Entered January 3, 1957.

In the District Court for the District of Alaska,
Third Division

(Formerly No. 6885—Fourth Division)

Civil No. 12,883

[Title of Cause.]

MOTION FOR EARLY TRIAL

Comes now Donald A. Burr, Assistant United States Attorney, and moves that the above-referenced case be set for trial at the earliest convenience of the Court for the following reason:

That the instant case concerns the taking of property by the Government through condemnation proceedings with the sole issue remaining to be decided a determination of just compensation. Undue delay in the trial of said case has caused hardship on the owners of such property and will continue to so do until such time as they are adequately compensated by the United States Government.

Dated at Anchorage, Alaska, this 15th day of May, 1957.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1957.

[Title of District Court and Cause.]

MINUTE ORDER GRANTING MOTION
FOR EARLY TRIAL

Now at this time, upon the Court's motion; It Is Ordered that the motion for early trial in the above cause, be and hereby is granted and cause to be heard by the next visiting judge on a date to be set for July, 1957.

Entered May 31, 1957.

[Title of District Court and Cause.]

MINUTE ORDER SETTING CAUSE
FOR TRIAL

The above cause is set for trial Monday, December 16th, 1957, at 10:00 a.m. Trial will take approximately 2 days.

Entered December 9, 1957.

[Title of District Court and Cause.]

TRIAL BY JURY

Plaintiff United States represented in court by Assistant United States Attorney Donald A Burr.
Defendant Mr. Dan J. Kennedy present in court and represented by counsel Mr. Edward V. Davis.

A discussion of questions at issue by Court and counsel.

Case will be stricken from Trial Calendar for today and will later try and set this case for trial in January.

Decision will be reserved as to questions of jurisdiction relating to defenses to the taking, raised by the Answer and whether complaint may be amended.

Counsel for the defense will submit briefs to Court by December 23rd and the Government may have until December 30th to answer by brief and a reply by defendant by January 3rd, 1958.

At 10:45 o'clock Court declared recess for 10 minutes.

Ten Fifty-five o'Clock A.M.

Court resumed session.

The Court announced to the jurors present that no jury will be required in this case and that they were accordingly excused to report to the Main Courtroom at 10:00 o'clock a.m. Wednesday, December 18th, 1957.

Entered December 16, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under the power of eminent domain and

for the ascertainment and award of just compensation to the owners and parties in interest.

2. The request for condemnation originates from the Solicitor for the Department of Interior, which request was in the form of a letter addressed to the Attorney General of the United States of America and is attached hereto as Exhibit 1.

3. The Solicitor for the Department of Interior is duly authorized to institute condemnation proceedings for and on behalf of the Secretary of the Interior pursuant to Departmental Order No. 2509, Amendment No. 7, a copy of which is attached hereto as Exhibit 2.

4. The authority for the taking in the instant case is the Act of August 1, 1888, as amended (62 Stat. 986; 40 U.S.C., 1946 ed., Supp. III, sec. 257), and Interior Department Appropriation Act, 1951 (Chap. VII, Public Law 759, 81st Cong.).

5. The use for which the property is being taken is as a part of Mount McKinley National Park, Alaska, within which exterior boundaries it is now located as shown by the plat attached hereto as Exhibit 3. The proposed use has been determined in the interest of the United States and otherwise necessary and advantageous to the Government by the Solicitor of the Department of the Interior for and on behalf of the Secretary of said Department. See Exhibit 1.

6. The interest to be acquired in the property is an estate in fee simple.

7. The property so to be taken is in the Nenana Recording Precinct, Fourth Judicial Division, Territory of Alaska, and is more particularly described as follows:

Tract A: The south half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing five acres, according to the Official Plat of Survey of the said land, on file in the Bureau of Land Management;

Tract B: The south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$); the north half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$), and the north half ($\frac{1}{2}$) of the south half ($\frac{1}{2}$) of the north half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of Section 4 in Township 14 South of Range 7 West of the Fairbanks Meridian, Alaska, containing thirty-five (35) acres, according to the official Plat of Survey of said land, on file in the Bureau of Land Management,

together with all buildings and improvements, if any, all appurtenances thereto, and all interests therein, as shown on the plat attached hereto and by this reference made a part hereof as Exhibit 4.

8. The persons known to the plaintiff to have or claim an interest in the property are:

Tract A (as described in paragraph 7)—Dan T. Kennedy;

Tract B (as described in paragraph 7)—Duke E. Stubbs, Mrs. Elizabeth S. Stubbs.

9. In addition to the persons named, there are or may be others who have or claim some interest in the property to be taken, whose names are unknown to the plaintiff and on diligent inquiry have not been ascertained. They are made parties to the action under the designation “Unknown Owners.”

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Dated at Anchorage, Alaska, this 26th day of December, 1957.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed December 26, 1957.

PLAINTIFF'S EXHIBIT NO. 1

United States Department of the Interior
Office of the Solicitor
Washington 25, D. C.

Jun. 26, 1951

The Honorable,
The Attorney General,
Washington 25, D. C.

Sir:

In connection with the administration, protection, and development of Mount McKinley National Park, Alaska, as established by the act of February 26, 1917 (39 Stat. 938), and acts supplementary thereto and amendatory thereof, I have determined that it is necessary, advantageous, and in the interest of the United States to acquire by condemnation the tracts of land, aggregating forty acres, situated within the exterior boundaries of the Park. One of these tracts is owned by Mrs. Elizabeth S. Stubbs, whose most recent address is understood to be 545 West 111th Street, Apartment 6-B, New York City 25, New York. The other tract is owned by Dan T. Kennedy, whose address is believed to be Anchorage, Alaska.

The lands proposed for condemnation are described in the enclosed certified copies of patents numbered 1037562 and 1062549, to which are attached copies of a plat, marked Exhibit "A," showing the boundaries of the two tracts. As indi-

ated in the enclosed letters of April 2, 1951, and April 19, 1951, from the United States Commissioner, Nenana, Alaska, and the Manager of the Land Office, Fairbanks, Alaska, title records other than the enclosed patents from the United States are not available with respect to these two tracts. It appears, therefore, that there are no transfers of record affecting the land in question.

It is requested that you cause condemnation proceedings to be instituted pursuant to the act of August 1, 1888, as amended (62 Stat. 986; 40 U.S.C., 1946 ed., Supp. III, sec. 257), to acquire these lands in fee simple, subject to existing easements for roads, highways, and public utilities, if any.

Funds appropriated by the Interior Department Appropriation Act, 1951 (Chapter VII, Public Law 759, 81st Cong.), are available for payment of the awards to be made for these lands (Appropriation symbol: 14X1035—Account 341.11 MTMK).

This application for the institution of proceedings for condemnation, and the determination contained herein, are made in the exercise of authority delegated by the Secretary of the Interior under Section 2 of Reorganization Plan No. 3 of 1950 (15 F. R. 3174) to the Solicitor of the Department of the Interior in section 28 of Order No. 2509, as amended (15 F. R. 5058).

Any additional information desired by the United States Attorney may be obtained from the Super-

intendent, Mount McKinley National Park, McKinley Park, Alaska.

Very truly yours,

/s/ MARTIN G. WHITE,
Solicitor.

Enclosures 5.

Duly Certified.

PLAINTIFF'S EXHIBIT NO. 2

United States Department of the Interior
Office of the Secretary

79903

July 31, 1950

Order No. 2509, Amendment No. 7.

Subject: Delegations of Authority—General.

A new section, numbered 28 and reading as follows, is added to Order No. 2509:

Sec. 28 Acquisition of real estate by condemnation.

(a) The Solicitor of the Department of the Interior is authorized to exercise the power of the Secretary of the Interior under section 1 of the act of August 1, 1888 (25 Stat. 357), as amended (40 U. S. C., 1946 ed., Supp. III, sec. 257), to acquire real estate for the United States by condemnation, under judicial process, whenever in the opinion of the Solicitor it is necessary or advantageous to the

Government to do so, and the Solicitor is authorized to submit to the Attorney General of the United States applications for the institution of proceedings for condemnation.

(b) The Solicitor of the Department of the Interior is authorized to exercise the power of the Secretary of the Interior under section 1 of the act of February 26, 1931 (46 Stat. 1421, 40 U. S. C., 1946 ed., sec. 258a), to sign declarations of taking.

(Issued under section 2, Reorganization Plan No. 3 of 1950, 15 F. R. 3174.)

/s/ WILLIAM G. WARNE,
Acting Secretary of the
Interior.

[Title of District Court and Cause.]

MINUTE ORDER RE COURT
TRIAL CALENDAR

During the call of the 1958 Term of Court Calendar, January 2, 1958, and upon stipulation of respective counsel, this cause, No. A-12883, was set for trial, in chronological order, to follow cause No. A-12877.

Entered January 2, 1958.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now Dan T. Kennedy, one of the above-named defendants, and moves that plaintiff's amended complaint be dismissed for the reason that the same does not state a claim in favor of the plaintiff and against the defendant, Dan T. Kennedy, upon which any relief can be granted by this court. This motion is based on all the records and files in this action and is supported by the brief and reply brief filed on behalf of the defendant, Dan T. Kennedy, with reference to plaintiff's original complaint.

Dated at Anchorage, Alaska, this 28th day of January, 1958.

DAVIS, HUGHES &
THORSNESS,

By /s/ EDWARD V. DAVIS,
Attorneys for Defendant,
Dan T. Kennedy.

Receipt of copy acknowledged.

[Endorsed]: Filed January 29, 1958.

[Title of District Court and Cause.]

OPINION

Donald A. Burr,
Assistant United States Attorney,
Anchorage, Alaska,
For Plaintiff.

Davis, Hughes and Thorsness,
Anchorage, Alaska,
For Defendant, Dan T. Kennedy.

Hodge, District Judge.

Plaintiff in this action seeks to acquire by condemnation proceedings certain property owned by the defendant Dan T. Kennedy, consisting of a homestead and improvements thereon, described as 'Tract A' in the complaint herein, located within the exterior boundaries of Mount McKinley National Park. Defendant filed an answer raising objections to the taking, pursuant to Rule 71A (e), FRCP. At the time of the trial defendant raised jurisdictional questions relating to such taking, in substance as follows: (1) There was no allegation in the complaint showing the authority of any officer of the United States to procure the land for the public use claimed, and hence no authority for such condemnation; (2) there was no showing of any specific legislative sanction or authority for condemning the land in question; and (3) the authority for the taking relied upon by plaintiff does not permit the United States to maintain this

action. The Court reserved decision upon these questions on briefs to be submitted.

Thereafter plaintiff filed an amended complaint alleging that the request for the condemnation originated from the Solicitor for the Department of the Interior in the form of a letter addressed to the Attorney General of the United States, and that the Solicitor for such Department is duly authorized to institute the proceeding for and on behalf of the Secretary pursuant to Departmental order No. 2509, amendment No. 7. Copies of the letter and order were attached as exhibits. Defendant then filed a motion to dismiss the amended complaint upon the grounds that it does not state a claim upon which relief may be granted, and both parties submitted briefs on the issues thus raised.

The Government relies in its complaint and brief upon two statutory enactments as authority for the taking, being the Act of August 1, 1888, as amended (62 Stat. 986, 40 USC 257), and the Interior Department Appropriation Act of 1951 (Chap. VII, Public Law 759, 81st Congress, 64 Stat. 692). The first is what has been referred to as the general statute relating to condemnation of private realty for Government use, and provides as follows:

“In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may

acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and Section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.” (Emphasis added.)

The general appropriation act relied upon provides, as far as is pertinent here, as follows:

“Chapter VII, National Park Service

“Construction

“For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of roads, trails, parkways, buildings, utilities, and other physical facilities; and the acquisition of lands, interests therein, improvements, and water rights; to remain available until expended * * *” (Emphasis added.)

The Act of Congress relating to the establishment, boundaries and control of Mount McKinley National Park are found in Title 16, USC, Secs. 347 to 355a, incl. By Sec. 355, adopted March 19, 1932, the boundaries were changed, apparently in-

cluding the lands of the defendant,¹ who acquired his land by patent from the United States on May 24, 1930. Neither the original act establishing such Park nor the amendments thereto contain any specific authorization to the Secretary of the Interior or any other public officer relating to the acquisition by condemnation or otherwise of private lands within the boundaries of the Park; and no such provision is found in the general statutes relating to the jurisdiction and powers of the National Park Service. 16 USC, Secs. 1-18.

By contrast, numerous instances are found in the statutes relating to the establishment of national parks in which the Secretary of the Interior, through the National Park Service, is given express authority to acquire private lands or property with reference to such particular park or place, under the provisions of Sec. 257 of Title 40, all being found in Title 16, USC, as follows: Sec. 47 (e), Yosemite National Park; Sec. 81 (c & d), Colonial National Historical Park; Sec. 164, Glacier National Park; Sec. 242, Theodore Roosevelt National Memorial Park; Sec. 403 (i), Great Smoky Mountains National Park; Sec. 462 (d), Historic Sites and Buildings; Sec. 407 (m), Independence National Historical Park; Sec. 1 (b) (7) (1953),

¹Some question is also raised by Kennedy as to whether or not his property is actually intended to be included within the Park boundaries. However, for the purpose of this motion, the allegations of the complaint must be taken as true.

Acquisition of Right of Way for roads within authorized boundaries of national parks.

If it was the intention of Congress to make similar provision as to Mount McKinley National Park, surely it would have done so. Instead, the 1932 Act contains the following pertinent clause:

“* * * Provided, however, that such isolated tracts of land lying east of the Alaska Railroad right of way and the west bank of the Nenana River between the north bank of Windy Creek and the north park boundary as extended eastward are also included in said park; provided further, that nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land.” (Emphasis added.)

A similar clause relating to existing claims or entry under the land laws is found in the original Act. (16 USC 348.)

It has been held repeatedly that although the Federal Government has the power to take private property essential to the public welfare, it exercises that power only pursuant to specific legislation; that express legislative authority is necessary to authorize the condemnation of private property for public use, and statutes claimed to confer such

power must be strictly construed; and that Sec. 257 of Title 40 confers no general authority to acquire lands by condemnation proceedings but only authority to institute such proceedings in furtherance of or in execution of authority otherwise granted. *United States vs. Raders*, 70 F. 748; *United States vs. A Certain Tract of Land in Cumberland Tp.*, 70 F. 940; *United States vs. Certain Lands in Narragansett, R. I.*, 145 F. 654; *United States vs. Fisk Building, et al.*, 99 F. Supp. 592; *Carmack vs. United States*, 135 F. 2d 196; *United States vs. 43,355 Sq. Ft. of Land in King County, Wash.*, 51 F. Supp. 905; *United States vs. Parcel of Land, etc.*, 100 F. Supp. 498; *Youngstown Sheet and Tube Co., vs. Sawyer*, 103 F. Supp. 569, 575. Sec. 257 is therefore not sufficient authority to sustain this action, in the absence of other specific legislation.

Plaintiff also relies upon the General Appropriation Act above quoted, claiming that the provisions of such Act appropriating funds for the "acquisition of lands," is sufficient to authorize this condemnation, citing *United States vs. Beaty*, 198 F. 284; *United States vs. Graham and Irvine*, 250 F. 499; *Hanson Lumber Co. vs. United States*, 277 F. 894 (affirmed 261 U.S. 581); *United States vs. North American Transp. & Trading Co.*, 253 U.S. 330; *United States vs. Threlkeld*, 72 F. 2d 464, certiorari denied 293 U.S. 620; *Polson Logging Co. vs. United States*, 160 F. 2d 712.

Examining these cases I find that the first three support plaintiff's contention only to the extent

that it is held that words authorizing the "purchase" of land under appropriation acts or general acts must be deemed to include by implication the right to acquire such lands by condemnation proceedings; but in each case specific authorization to purchase or acquire such land appears. In the case of *Hanson Lumber Co. vs. United States* the Supreme Court, on review, said:

"The authority to condemn conferred by * * * Act of 1888) * * * extends to every case in which an officer of the Government is authorized to procure real estate for public uses."

The case of *United States vs. North American Transp. & Trading Co.* does not relate to condemnation proceedings but only to the liability of the United States for the taking of property where not taken under legislative authority.

The cases of *United States vs. Threlkeld* and *Polson Logging Co. vs. United States* do hold that the powers conferred upon the Secretary of Agriculture for the construction and maintenance of roads within the national forest area under 16 USC 471-482 and by appropriation acts are sufficiently broad to confer the authority to condemn land for such purpose under 40 USC 257; and that by necessity the statutory authorization to procure real estate in such cases may be evidenced by the making of an appropriation as well as by specific authorization to acquire. These cases are clearly distinguishable from the case at bar. The Court in the *Threlkeld*

case recognizes the doctrine set forth in the case of *United States vs. Raders* and *United States vs. A Certain Tract of Land in Cumberland Township*, above cited, and is in accord with such principle.

I am unable to find that the General Appropriation Act relating to all of the national parks, as to which in many cases specific authority is conferred upon the Secretary of the Interior to acquire private lands, may be construed by "necessary implication" to authorize the condemnation proceeding in this instance, especially in view of the express preservation of the rights of the holders of land by homestead within the boundaries of the Park, quoted above.

The letter from the Solicitor of the Department of the Interior, and the delegation of authority from the Secretary to the Solicitor of the power conferred by Sec. 257, referred to in plaintiff's amended complaint, do not confer any authority not granted by Congressional enactment.

It must be concluded that the amended complaint fails to state a claim upon which the relief sought may be had. The motion to dismiss is therefore granted. Unless plaintiff requests leave to amend its complaint within twenty days from the date of filing of this opinion, an order may be presented dismissing the cause of action set forth in plaintiff's complaint as to Tract A with prejudice, and with costs to the defendant Kennedy.

Dated at Nome, Alaska, this 6th day of March, 1958.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed March 10, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

Third Judicial Division,
Territory of Alaska—ss.

Donald A. Burr, being first duly sworn, deposes and says:

That he is the counsel of record for the plaintiff, United States of America, in the instant action.

That the instant action was instituted in Fairbanks, Alaska, on September 6, 1951, for the condemnation of certain property owned by the defendant Kennedy.

That the case was thereafter transferred from Fairbanks, the Fourth Judicial Division, to Anchorage, Third Judicial Division, upon motion for change of venue submitted by defendant Kennedy.

That the issue of just compensation came on for hearing during the latter part of 1957, at which time the defendant moved for dismissal of the plaintiff's complaint for various reasons.

That the Court ordered briefs submitted, as a result of which the defendant's motion was ultimately granted and the decision on the motion was duly entered on March 10, 1958.

That the Court in its written decision on the defendant's motion, allowed the plaintiff United States of America twenty days from the date of entry of the decision within which to file an amended pleading in this matter.

That the practices and regulations of the Department of Justice require liaison with the lands division in Washington, D. C., on all matters pertaining to condemnation proceedings.

That your affiant, upon receipt of the decision of the Honorable Walter H. Hodge, immediately forwarded same to the Department of Justice urging immediate action.

That your affiant has received a telegraphic communication dated March 14, 1958, from Ralph J. Luttrell, Chief, Land Acquisition Section, Lands Division, Department of Justice, urging an enlargement of time to enable consideration of the Court's recent decision on the defendant's motion to dismiss.

That the liaison required between the field office of the various United States Attorneys and the Department of Justice requires considerable time in most cases, and thus the motion for enlargement of time for a period of thirty days is necessary to enable your affiant to comply with the practices and

regulations of the Department of Justice under whose auspices your affiant is presently working.

Further affiant sayeth not.

Dated at Anchorage, Alaska, this 17th day of March, 1958.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Subscribed and Sworn to before me this 17th day of March, 1958, at Anchorage, Alaska.

[Seal] /s/ ROSEMARY RICE,
Deputy Clerk.

Receipt of copy acknowledged.

[Endorsed]: Filed March 22, 1958.

[Title of District Court and Cause.]

MOTION FOR ENLARGEMENT
OF TIME

Comes now Donald A. Burr, Assistant United States Attorney, for the plaintiff, United States of America, and moves for an enlargement of time for a period of thirty days from and after the 30th day of March within which to file an amended pleading or take such other action as may appear proper. This motion is supported by affidavit attached hereto and made a part hereof.

Dated at Anchorage, Alaska, this 17th day of March, 1958.

/s/ DONALD A. BURR,
Assistant United States
Attorney.

ORDER

The Court having considered the motion of the plaintiff, United States of America, and being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed that the motion be and the same is hereby granted.

Dated at Anchorage, Alaska, this 20th day of March, 1958.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered March 22, 1958.

[Title of District Court and Cause.]

MOTION TO RECONSIDER ORDER SUS-
TAINING DEFENDANT'S MOTION TO
DISMISS GOVERNMENT'S CONDEMNATION
PROCEEDING

Comes now the United States of America, plaintiff herein, by its undersigned attorneys, and moves

the Court to reconsider its order dated March 6, 1958, which sustained defendant's motion to dismiss the condemnation proceeding, subject to the Government amending its complaint within 20 days before the filing of the order dismissing the proceeding, with costs to defendant, on the following grounds:

1. That the authorities cited by the Government in its complaint contains express authorization to the Secretary of the Interior to procure property and to cause this proceeding to be instituted.
2. That "costs" cannot be assessed against the Federal Government in this proceeding in the absence of express legislative authorization.
3. That the Court's holding is contrary to the law and the intent of Congress.

Dated: 23 April, 1958.

/s/ WILLIAM T. PLUMMER,
United States Attorney;

/s/ DONALD A. BURR,
Assistant United States
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1958.

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION
OF TIME

It Is Hereby Stipulated by and between Donald A. Burr, assistant United States Attorney for the District of Alaska, Third Judicial Division, of the attorneys for the plaintiff, and Edward V. Davis, of the attorneys for the defendant, Dan T. Kennedy, that the defendant Kennedy may have to and including the 15th day of May, 1958, to file statement of reasons in opposition to motion of the plaintiff to reconsider the court's previous order in the above-entitled matter, and to file answering brief to the brief filed by the plaintiff in support of its motion for reconsideration.

Dated at Anchorage, Third Judicial Division, Territory of Alaska, this 28th day of April, 1958.

/s/ DONALD A. BURR,
Assistant United States Attorney, of Plaintiff's Attorneys.

/s/ EDWARD V. DAVIS,
Of Attorneys for the Defendant,
Dan T. Kennedy.

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL OPINION

William T. Plummer,
United States Attorney, and
Donald A. Burr,
Assistant United States Attorney,
For Plaintiff.

Davis, Hughes and Thorsness,
Anchorage, Alaska,
For Defendant.

Hodge, District Judge.

Plaintiff has moved the undersigned judge of the above-entitled court to reconsider his opinion filed herein on March 10, 1958, wherein the Court sustained a motion of the defendant, Dan T. Kennedy, to dismiss plaintiff's complaint (160 F. Supp. 30). The motion to reconsider is granted and the Court has considered the matter anew upon briefs submitted by both parties.

Plaintiff relies in support of its principal contention that the authority for the taking of the land in question is evidenced by the Interior Department Appropriation Act of 1951, and the Act of August 1, 1888 (40 U.S.C.A., Sec. 257), upon four decisions other than the cases previously considered in such opinion. The case of *United States vs.*

Carmack, 329 U. S. 230 (reversing the Circuit Court, 151 F. 2d 881, following retrial of case cited in my original opinion, 135 F. 2d 196), involves a proceeding instituted by the United States to condemn land as a site for a postoffice, in reliance upon several Federal statutes, including the Public Buildings Act of May 25, 1926 (40 U.S.C.A. 341), and the General Condemnation Act above referred to (40 U.S.C.A. 257). The Public Buildings Act gave specific authority to the Secretary of the Treasury (later the Federal Works Administrator) "to acquire by purchase, condemnation or otherwise, such sites * * * as he may deem necessary * * *". The Court holds that the United States has inherent power to appropriate land determined necessary for the public use, when such power is exercised by Congress. To quote from the opinion (p. 240):

"The considerations that made it appropriate for the Constitution to declare that the Constitution of the United States, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land make it appropriate to recognize that the power of eminent domain, when exercised by Congress within its constitutional powers, is equally supreme."

"We find in the broad terms of the Public Buildings Act authority for the designated officials to select the site they did. We find, in both

Acts, authority for them to acquire by condemnation the site thus lawfully selected.”¹

The right of the United States to condemn land is conceded by the defendant and is certainly not denied by this Court, but I agree with the defendant’s contention that the question here is whether the United States, through Congress, has exercised that right.

The case of *United States vs. Village of Highland Falls*, 154 F. 2d 224, does not hold as contended by plaintiff that one Congress cannot preclude another from exercising the power of eminent domain, but holds rather that such power is one which even the State Legislature cannot surrender; and relates to the question of a state divesting itself of such governmental authority by contract. This case is clearly not applicable here.

The recent decision of the District Court for the District of Columbia on March 24, 1958 (not yet reported) of *Seneca Nation of Indians vs. Brucker* holds that Congress may, by general legislation,

¹To the same effect see *United States vs. Fisk Building*, 99 F. Supp. 592, wherein the Court said “The power of eminent domain is inherent in the Government as an aspect of sovereignty, subject to the requirement of the Fifth Amendment that just compensation be paid. *Albert Hanson Lumber Co. v. United States*, 261 U. S. 581, 43 S. Ct. 442, 67 L. Ed. 809. However, the power to condemn may be exercised only when explicitly authorized by statute,” citing the *Carmack* case.

override the provisions of an Indian treaty where the intent of Congress to do so is clear, and that an appropriation act which appropriated money for the construction of the Allegheny Reservoir Project “manifested a clear Congressional intention to authorize the construction of the project”; and that since the project was specifically authorized by the appropriation, the right to condemn land for such purpose must be upheld. Similarly, the case of *United States vs. 5,677.94 Acres of Land of the Crow Reservation*, 152 F. Supp. 861, holds that an appropriation act making specific appropriations for preconstruction work on the Yellowtail Dam, furnishes sufficient authority for taking of the land within the boundaries of the Indian reservation, when considered with the General Condemnation Act. These decisions deal with appropriations for a specific project, relying upon authority of the Threlkeld and Polson cases cited in my original opinion, and are likewise not applicable here.

Plaintiff also cites the legislative history of the Interior Department Appropriation Act for 1951 as indicating the intent of Congress to provide for the acquisition of privately owned land in the Mount McKinley National Park. Such history adds nothing to what has already been said on this subject, and that is that the appropriation mentioned was for the “general acquisition of privately owned lands within park and monument boundaries”; and as we have seen, there were many Acts of Congress granting specific authority to condemn lands as to

certain specified national parks, but no such provision as to Mount McKinley National Park.

Plaintiff concedes that Sec. 257 of Title 40 alone is not sufficient authority for its complaint, but contends that the Court “appears to have overlooked the fact that 40 USCA, Sec. 257 contains a general grant of power to officers of the Federal Government to condemn property when such officers are authorized by Congress to procure real estate.” This is an understatement, for this Court certainly did not overlook such fact. However, plaintiff also contends that the cited Appropriation Act “contains a specific grant of the power to acquire land for park purposes,” which “the Court fails to recognize.” No such specific grant of power with reference to Mount McKinley is found in any cited statute. In order to sustain such power there must be a clear intent of Congress, either by conferring “broad powers” such as held in the *Polson* and *Threlkeld* cases, or by specific action as in the *Seneca* and *Crow* cases. To sustain the contention of plaintiff would be to stretch the rule of “legislation by implication” beyond the powers of this Court.

In reference to that portion of my opinion relating to the preservation of the rights of homesteaders or entrymen to the full use and enjoyment of their land provided by the Act of Congress creating the Park (16 USC 348, and 1932 amendment), plaintiff cites the *Yosemite Valley Case*, 82 US 77 (1872), and *Stockley vs. United States*, 260 US 532, which

deal with the question of whether a party, by mere settlement upon lands of the United States under pre-emption laws or as an entryman under homestead laws, acquires such a vested interest in the premises as to deprive Congress or the General Land Office of the power to divest it by a grant to another party. These decisions are not in point. Although such reservation may not be controlling, yet such specific Act of Congress seems important in determining the intent of the Congress with relation to condemnation of private land in Mount McKinley Park.

Plaintiff also contends that reference in the Court's opinion to legislation relating to other park areas should not serve as a "formula so as to decipher or evaluate such laws or legislation upon a comparison basis," and that the comparison made is not justified. Again, such Acts were cited to show the clear intent of Congress as to other national parks to condemn or acquire lands which, significantly, is not mentioned in the Act creating Mount McKinley Park. Incidentally, Congress has recently manifested the same intention in an Act to authorize the establishment of the Petrified Forest National Park in the State of Arizona (Public Law 85-358, 85th Congress, March 28, 1958), which specifically authorizes the Secretary of the Interior to acquire in the public interest any non-Federal land or interests in land within the area authorized to be established by such Park.

Finally, plaintiff contends that the Government cannot be held liable for costs in the absence of specific authorization by Congress, citing *United States vs. Patterson*, 206 F. 2d 345; and that there is no statutory authority for taxing costs against the United States in this instance. This position appears to be correct.

Finding that Congress has not either expressly or by clear intendment authorized the condemnation of land within the Park area here involved, I must adhere to my former opinion, except as to the matter of costs. Order dismissing plaintiff's complaint and this action as to Tract A may be presented accordingly. Findings of fact and conclusions of law will not be necessary.

Dated at Nome, Alaska, this 13th day of June, 1958.

/s/ WALTER H. HODGE,
District Judge.

Received June 16, 1958.

[Endorsed]: Filed June 16, 1958.

In the District Court for the District of Alaska,
Third Judicial Division

Civil No. A-12,883

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, Situate in Nenana Recording Precinct, Fourth Division, Territory of Alaska, and DAN T. KENNEDY, et al.,

Defendants.

ORDER OF DISMISSAL

Defendant, Dan T. Kennedy, having heretofore moved for dismissal of the above-entitled cause as against Tract "A" and as against the defendant, Dan T. Kennedy, and the matter having been argued both orally and on written briefs, and the court having heretofore, and on the 6th day of March, 1958, rendered its opinion directing such dismissal and the plaintiff having moved for reconsideration of the matter and the court having granted the motion for reconsideration and having reconsidered the matter upon briefs presented by the respective parties, and the court being fully advised in the premises,

Now, Therefore, it is hereby Ordered and Adjudged that the above-entitled action shall be and

the same is hereby dismissed insofar as it concerns
tract "A" described in plaintiff's complaint and
amended complaint and insofar as it concerns the
defendant, Dan T. Kennedy. This order of dismissal
is made without allowance of costs to either party.

Findings of Fact and Conclusions of law are not
considered to be necessary and need not be prepared
or entered.

Dated at Nome, Alaska, this 25th day of
June, 1958.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered June 25, 1958.

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given under the provisions of
Rule 73, Federal Rules of Civil Procedure, that the
plaintiff, United States of America, hereby appeals
to the United States Court of Appeals for the Ninth
Circuit from the final order dismissing the plain-
tiff's complaint. The entire record, including ex-
hibits, is hereby designated to be included for the
purpose of this appeal.

Dated at Anchorage, Alaska, this 8th day of August, 1958.

WILLIAM T. PLUMMER,
United States Attorney;

By /s/ GEORGE F. BONEY,
Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed August 8, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding, no designation of record having been filed.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Order of Dismissal filed and entered in the above-entitled cause by the above-entitled Court on the 27th day of June, 1958.

Dated at Anchorage, Alaska, this 3rd day of September, 1958.

[Seal] /s/ WM. A. HILTON,
Clerk.

cc: United States Attorney,
Federal Building,
Anchorage, Alaska.

Davis, Hughes & Thorsness,
P. O. Box 477,
Anchorage, Alaska.

[Endorsed]: No. 16179. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Dan T. Kennedy, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed and Docketed: September 9, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16179

UNITED STATES OF AMERICA,

Appellant,

vs.

DAN T. KENNEDY,

Appellee.

STATEMENT OF POINTS ON APPEAL

The United States of America, appellant, makes the following statement of points upon which it intends to rely on appeal:

1. The District Court erred as a matter of law in holding that the Secretary of the Interior lacked the power to take by eminent domain the property involved in this action.

2. The District Court erred as a matter of law in holding that the Act of September 6, 1950, 64 Stat. 595, 692, and the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C. sec. 257, together with other statutes of which the District Court could have taken judicial notice do not constitute statutory authority for the taking of the property involved in this action by eminent domain.

3. The District Court erred in holding that Congress has not either expressly or by clear intentment authorized the condemnation of land within the park area involved in this action.

4. The District Court erred in holding that the amended complaint failed to state a claim on which the relief sought may be had and in dismissing the complaint.

THE UNITED STATES OF
AMERICA,

By /s/ PERRY W. MORTON,
Assistant Attorney General;

/s/ ROGER P. MARQUIS,

/s/ A. DONALD MILEUR,
Attorneys, Department of Jus-
tice, Washington 25, D. C.

Certificate of service acknowledged.

[Endorsed]: Filed October 16, 1958.

No. 16179

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

DAN T. KENNEDY, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD DIVISION**

BRIEF FOR THE UNITED STATES, APPELLANT

PERRY W. MORTON,

Assistant Attorney General,

WILLIAM T. PLUMMER,

United States Attorney, Anchorage, Alaska,

ROGER P. MARQUIS,

A. DONALD MILEUR,

Attorneys,

Department of Justice, Washington 25, D.C.

FILED

MAY - 7 1969

PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16179

UNITED STATES OF AMERICA, APPELLANT

v.

DAN T. KENNEDY, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD DIVISION*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINIONS BELOW

The original decision of the district court is reported at 160 F. Supp. 30. The decision of the district court on the motion of the United States to reconsider is reported at 162 F. Supp. 939.

JURISDICTION

This is an appeal from the final order of the district court which dismissed the complaint of the United States in a condemnation proceeding entered on June 25, 1958 (R. 60-61). Notice of appeal was filed on August 8, 1958. The jurisdiction of the district court over the condemnation proceedings rested on 28 U.S.C. sec. 1358. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether Chapter VII of the Act of September 6, 1950, 64 Stat. 595, 679, appropriating funds for the National Park Service of the Department of the Interior, authorized the acquisition of appellee's land within the established boundaries of Mount McKinley National Park, Alaska, and, if so,

2. Whether such acquisition could be accomplished by condemnation.

STATUTES INVOLVED

The relevant portion of the Act of June 25, 1948, 62 Stat. 869, 986, provides as follows:

SEC. 6. Section 1 of the Act approved August 1, 1888 (chapter 728, 25 Stat. 357, 40 U.S.C., sec. 257) is amended to read as follows:

“That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this Act, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.”

The relevant portion of the Act of September 6, 1950, 64 Stat. 595, 692, provides as follows:

CONSTRUCTION

For construction and improvement, without regard to the Act of August 24, 1912, as amended (16 U.S.C. 451), of roads, trails, parkways, buildings, utilities, and other physical facilities; and the acquisition of lands, interests therein, improvements, and water rights; to remain available until expended, \$19,667,000, of which not to exceed \$7,935,000 is for liquidation of obligations incurred pursuant to authority granted under the heads "Independence National Historical Park, Pennsylvania", Parkways, National Park Service," and "Roads and Trails, National Park Service", in the Interior Department Appropriation Act, 1950: *Provided*, That the unexpended balances of prior year appropriations, including unused balances of related contract authorizations, for the foregoing purposes, shall be transferred to and merged with this appropriation: *Provided further*, That not to exceed \$150,000 of the funds available for the Independence National Historical Park, Pennsylvania, shall be available after January 1, 1951, for the management, protection, maintenance, and rehabilitation of Independence Hall, grounds, and structures in that Park.

STATEMENT

This action is for the taking under the power of eminent domain of two tracts of land within the exterior boundaries of Mount McKinley National Park in Nenana Recording Precinct, Fourth Judicial Division, Alaska. The complaint was filed in September 1951 (R. 3-5). By answer filed in November

1951 appellee Kennedy objected to the taking of Tract A, containing five acres. Tract B, containing 35 acres, has been acquired by the United States pursuant to a stipulation and judgment entered in February 1956 by the district court in the Fourth Judicial Division (R. 20-25). Allegations of the answer as to lack of necessity for the taking were stricken on motion (R. 11-12). The case was transferred in November 1956 for trial from the Fourth to the Third Judicial Division at the request of Mr. Kennedy (R. 26-27). It came on for trial in December 1957.

Prior to the empaneling of the jury, appellee raised the question whether there was statutory authority under which the Secretary of the Interior could condemn land in Mount McKinley National Park.¹ The parties thereafter briefed this issue for the district court. At the same time the United States filed an amended complaint. The changes were to show specifically that the Solicitor of the Department of the Interior had authority to cause initiation of the condemnation proceeding and that the proposed use was necessary and advantageous to the United States (R. 3-5; 30-37). Both the original and amended complaints cited as authority for the taking the Act of August 1, 1888, 62 Stat. 986, as amended,

¹ Since the question whether this alleged objection came too late was not raised in the trial court, we do not discuss the issue whether the denials of the answer for lack of information (R. 7-10) constitute sufficient assertion of appellee's "objections and defenses to the taking of his property" within the meaning of Rule 71A(e), F.R. Civ. P., so as to escape the following provision that "A defendant waives all defenses and objections not so presented."

40 U.S.C. sec. 257, and Chapter VII of the Act of September 6, 1950, 64 Stat. 595, 679. The latter act made appropriations for the Department of the Interior for the fiscal year 1951. The particular item with which this case is concerned is found at 64 Stat. 692. The item is entitled "Construction" under "National Park Service" and insofar as pertinent states:

For construction and improvement * * * of roads, trails, parkways, buildings, utilities, and other physical facilities; and *the acquisition of lands, interests therein, improvements, and water rights*; to remain available until expended, \$19,667,000 * * *.²

The court, on March 6, 1958, rendered a written opinion in which it granted the motion to dismiss on the ground that it was unable to find that the general appropriation act relating to all of the national parks could be construed to authorize condemnation proceedings in this instance. 160 F. Supp. 30. The United States filed a motion to reconsider, which was granted, and the court considered the matter anew upon briefs submitted by both parties. The court filed a supplemental opinion on June 13, 1958, reaffirming its former opinion finding that Congress had not, either expressly or by clear intendment, authorized the condemnation of land within the Park area here involved. 162 F. Supp. 939. This appeal followed.

² Emphasis supplied by appellant throughout this brief unless otherwise noted.

SUMMARY OF ARGUMENT

The complaint in condemnation was dismissed for failure to state a cause of action. Such procedure admits all well-pleaded averments. It leaves for the consideration of this Court only the questions of whether as a matter of law an appropriation act authorizing the acquisition of land and 40 U.S.C. sec. 257, which grants authority to condemn whenever an officer of the Government has been authorized to procure land, may be the basis of a condemnation proceeding and whether the appropriation act used in this case provided for the acquisition of appellee's land. Other questions of fact which might be placed in issue, such as the amount of just compensation, cannot be raised in this appeal.

I

This Court's decision in *Polson Logging Co. v. United States*, 160 F. 2d 712 (1947), and many other cases of the Supreme Court and other Circuits make it now well settled that the Government's power to condemn is coextensive with its power to purchase. It is further generally recognized that statutory authorization to procure real estate may be evidenced by the making of an appropriation as well as a specific authorization to acquire. Thus, the appropriation act and 40 U.S.C. sec. 257 have in many cases provided the basis for a condemnation action.

It is true that the particular facts vary from case to case. But in all cases where an appropriation act and 40 U.S.C. sec. 257 furnished the basis of condemnation, it is purely a matter of degree of discre-

tion in choosing the land to be taken. For some national parks there is a specific provision in the statute creating the park giving the power of condemnation. But the fact that there are alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Government must rely on that authority alone. The section of the act creating Mount McKinley National Park, which preserves the rights of homesteaders and other claimants, is not a limitation upon the power of the United States to condemn land.

II

The legislative history of the 1951 appropriation act for the National Park Service shows that the fund used in this case was for the acquisition of privately owned lands within the authorized boundaries of established national park areas. It was a flexible fund to be used to acquire land whenever it was advantageous to the Government to do so. The fund was available for the acquisition of land within any of the national park areas. It could not be said in advance which of the 714,000 acres of privately owned lands within the system would be acquired with this fund. The fund was to be spent where the land could be acquired at bargain prices, where there was a danger of the tracts being commercially developed adverse to the best interests of the park, or where the tracts stood in the way of development or proper use of the park area.

The only possible interpretation of the lower court's holding, consistent with its acknowledgement that

officers of the Government can condemn any land Congress has authorized them to procure, is that land could not be purchased or otherwise acquired in any national park save where there is express authority in the act establishing the park or the park is named in the appropriation act. Yet in the legislative history of this very appropriation, there are given at least seven instances where this same type of fund in prior years has been used to acquire land in park areas where there was neither express authority in the creating act nor specific designation of the park in the appropriation act. Further, in this very condemnation case a consent judgment was entered by which the United States has acquired 35 acres. The fact that it was a consent judgment is immaterial because under 41 U.S.C. sec. 14 no land may be acquired on account of the United States except under a law authorizing such purchase. The only place where such authority to purchase can be found for the consent judgment is in the 1951 appropriation for the National Park Service. Further, Congress made the 1951 appropriation without naming any specific parks where this general acquisition fund was to be used, although in the hearings Congress was advised that it was planned to use this fund to acquire land in parks where no authorization to acquire existed unless the appropriation itself provided it.

ARGUMENT

The basis which the district court had for dismissing the complaint was the lack of statutory authority to condemn. The district court believed

that Congress had not intended to permit the taking of privately-owned land in Mount McKinley National Park by eminent domain. 162 F. Supp. 939, 941-942. The error in the district court's reasoning arises from a misconception of the nature and effect of authority granted by the appropriation act, 64 Stat. 595, 692, the statute establishing Mount McKinley National Park, 16 U.S.C. secs. 347-355a, 39 Stat. 938, as amended, and the statutes establishing the National Park Service, 39 Stat. 535, as amended and supplemented, 16 U.S.C. secs. 1-18f. These acts of Congress provide the basis on which land could be *acquired* or *procured* within the boundaries of Mount McKinley National Park. Who would argue, indeed, that the United States did not have authority under the appropriation act to buy land in Mount McKinley National Park if somebody wanted to sell it to them? The district court vigorously denied that it had overlooked the fact that the Act of August 1, 1888, 40 U.S.C. sec. 257, contains a general grant of power to condemn property when officers of the Federal Government are authorized by Congress to procure it. 162 F. Supp. 939, 941. The district court therefore erred when it held the appropriation act and 40 U.S.C. sec. 257 were no statutory authority to condemn land in this case.

The above summarizes the sole question raised on this appeal. True, there are other questions which might be placed in issue, and the usual determination of just compensation for the land is still to be settled. But the district court disposed of the case by granting a motion to dismiss for failure to state a cause

of action. As the district court correctly recognized this procedure admitted all well-pleaded averments in the complaint. 160 F. Supp. 32. The procedure accordingly placed beyond dispute for present purposes all material allegations of the complaint. *Olan Mills Inc. v. Enterprise Publishing Co.*, 210 F. 2d 895, 897 (C.A. 5, 1954); Moore's Federal Practice (2d Ed.), Section 12.08.

We now proceed to discuss the question of authority granted by Congress to take the Kennedy tract by eminent domain, the only question of law considered by the district court.

I

Under the Act of August 1, 1888, 40 U.S.C. sec. 257, Congress has given authority to condemn any property where there is authority to purchase or otherwise acquire

The Act of August 1, 1888, sec. 1, 25 Stat. 357, as amended, 40 U.S.C. 257, provides:

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, * * *.

The meaning of this statute is repeatedly asserted by the many judicial decisions which have invoked its provisions. No useful purpose would be served by an exhaustive explanation of these cases. This Court's decision in *Polson Logging Co. v. United*

States, 160 F. 2d 712 (1947), is a definitive opinion on the subject. It is now well settled under this section of the code that the Government's power to condemn is coextensive with its power to purchase. *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 554 (1946); *Hanson Co. v. United States*, 261 U.S. 581, 587 (1923); *Lewis v. United States*, 200 F. 2d 183, 184 (C.A. 9, 1952), cert. den. 345 U.S. 907; *United States v. Certain Real Estate, &c.*, 217 F. 2d 920, 925 (C.A. 6, 1954); *United States v. Advertising Checking Bureau*, 204 F. 2d 770, 771-772 (C.A. 7, 1953); *Barnidge v. United States*, 101 F. 2d 295, 297-298 (C.A. 8, 1939); *United States v. Threlkeld*, 72 F. 2d 464, 465 (C.A. 10, 1934), cert. den. 293 U.S. 620; *United States v. Beaty*, 198 Fed. 284 (W.D. Va., 1912), reversed on other grounds, *Beaty v. United States*, 203 Fed. 620 (C.A. 4, 1913).

The district court seemed to recognize this rule.³ 162 F. Supp. 941. The court further recognized that an appropriation act can supply the authorization for the purchase and hence for the condemnation. This Court had perspicuously stated in *Polson Logging Co. v. United States*, *supra*, that "the statutory authorization to procure real estate may be evidenced by the making of an appropriation as well as by a specific authorization to acquire." 160 F. 2d 714. The district court repeated this language practically verbatim

³ "Plaintiff * * * contends that the Court 'appears to have overlooked the fact that 40 U.S.C.A. Sec. 257 contains a general grant of power to officers of the Federal Government to condemn property when such officers are authorized by Congress to procure real estate.' This is an understatement for this Court certainly did not overlook such fact." 162 F. Supp. 941.

in its original opinion when discussing *United States v. Threlkeld*, *supra*, and the *Polson* case. 160 F. Supp. 33. *Seneca Nation of Indians v. Brucker*, 162 F. Supp. 580 (D.C. 1958), affirmed 262 F. 2d 27 (C.A. D.C., 1958), the district court interpreted as holding "that an appropriation act which appropriated money for the construction of the Allegheny Reservoir Project 'manifested a clear Congressional intention to authorize the construction of the project'; and that since the project was specifically authorized by the *appropriation*, the right to condemn land for such purpose must be upheld" (162 F. Supp. at p. 940). Similarly, the district court found *United States v. 5,677.94 Acres of Land*, 152 F. Supp. 861 (Mont. 1957), to hold "that an *appropriation act* making specific appropriations for preconstruction work on the Yellowtail Dam, *furnishes sufficient authority* for taking of the land * * *." *Id.* The same view is expressed by the Sixth Circuit in *United States v. Certain Real Estate, &c.*, *supra*: "and where no other Act of Congress vests power to condemn property for a particular purpose an applicable appropriation Act may be looked to as the source of such power." 217 F. 2d 925.

The resolution of this case in the court below should have been, therefore, simply a matter of seeing whether the appropriation was in fact available to buy land in Mount McKinley National Park. In attempting to distinguish the cases on which the Government relied, the district court did not make a direct decision on this issue. It notices differences which might be important in some respects but are not controlling in this case. But the district court over-

looked the essential similarity between the present case and *Hanson Co. v. United States*, *supra*; *United States v. Beaty*, *supra*; *United States v. Threlkeld*, *supra*; and *Polson Logging Co. v. United States*, *supra*. In all these cases the power to condemn is upheld on the basis of an appropriation act and 40 U.S.C. sec. 257. The district court pointed out that in the *Polson* and *Threlkeld* cases the Secretary of Agriculture had broad powers to construct and maintain roads for national forests. That is true, as is the fact that here the Secretary of the Interior has broad administrative powers in the national parks. 16 U.S.C. secs 1-18f. But as long as there is an appropriation act granting authority to purchase, the difference between administering national parks and national forests will not affect the validity of the power to condemn.

Nor can a fundamental difference be made between those appropriations where the specific project is mentioned and the present case where the authority to purchase is given in general terms. The district court thought that *Seneca Nation of Indians v. Brucker*, *supra*, and *United States v. 5,677.94 Acres of Land*, *supra*, were distinguishable because they "deal with appropriations for a specific project." 162 F. Supp. 940. The specificity of the project varies in many cases but the differences are only matters of degree. In the *Hanson* case a specific canal, a thing then in being, was named. In the cases of *Seneca Nation of Indians v. Brucker* and *United States v. 5,677.94 Acres of Land* the appropriation was for a project to be constructed after

the act was passed and doubtlessly involved some post-appropriation discretion as to exact location.⁴ In the *Beaty* case there was even greater latitude, the appropriation merely calling "for the purchase of land accessible to the horse-raising section of the state of Virginia * * *." 198 Fed. 285. In the *Threlkeld* and *Polson* cases the discretion was greater still, as the appropriation was for national forests generally and could have been used to purchase property in any of them. Act of March 3, 1933, 47 Stat. 1432, 1449; Act of July 1, 1941, 55 Stat. 408, 422. Just as there is no requirement that Congress refer to particular projects in authorizing an officer to procure property or space (*United States v. Advertising Checking Bureau, supra*; *United States v. Certain Real Estate, &c., supra*), so there is no requirement that appropriations be broken down so that the Act gives separate treatment to particular projects. In the present case, as we shall show below, the appropriation was also available for purchase of privately owned land within the boundaries of existing national parks. Of what moment are these differences of specificity except that the statutes contain variable degrees of discretion in choosing the particular projects on which to spend the money? Certainly the authority to purchase has been bestowed in all cases, and nothing in 40 U.S.C. sec. 257 suggests the power to condemn is limited by the amount of discretion vested in the official concerned.

⁴ In fact, the *Seneca Nation* appropriation statute was a lump sum of \$449,000,000, of which the committee report showed \$1,000,000 was allocated to the particular project in question. Act of August 26, 1957, 71 Stat. 416, 417.

We believe the district court was led astray in part at least by the somewhat overlapping statutes granting authority to condemn in some national parks. There are for some parks, as the district court pointed out, individual sections authorizing condemnation in the statute creating the park. 160 F. Supp. 32; 162 F. Supp. 941. In these parks the Secretary of the Interior can have land condemned under either the statute creating the park or 40 U.S.C. sec. 257. But the fact that the Department of the Interior has alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Department must rely on that authority alone.

This brings us to the use which the court, in its original opinion, made of the reservation of existing claims in Mount McKinley. 16 U.S.C. sec. 348. In its supplemental opinion the court admits that these provisions "may not be controlling." 162 F. Supp. 941. The Congressional purpose in reserving rights of homesteaders or other claimants is not controlling, nor is it pertinent. That Congress did not in 1917 want to destroy existing claims to land by creating the Park is unrelated to whether Congress in 1951 intended to authorize purchase of land upon payment of the fair market value as full compensation.

II

There was authority to purchase the Kennedy tract in the appropriation act

Having established (1) that any time a government officer is authorized to purchase land he may obtain

it by the power of eminent domain if necessary, (2) that the authority to procure, and hence to condemn, land may be contained in an appropriation act, and (3) that the degree of specificity in designating the land to be procured does not control where there is authority to condemn, we come to the ultimate reason why the district court erroneously believed appellee's land could not be condemned.

In its first opinion the district court concluded (160 F. Supp. 33) :

I am unable to find that the General Appropriation Act relating to all of the national parks, as to which in many cases specific authority is conferred upon the Secretary of the Interior to acquire private lands, may be construed by "necessary implication" to authorize the condemnation proceeding in this instance, especially in view of the express preservation of the rights of the holders of land by homestead within the boundaries of the Park * * *.

In summarizing its second opinion the district court revealed even more clearly the basis of its holding (162 F. Supp. 941-942) :

Finding that Congress has not either expressly or by clear intendment authorized the condemnation of land within the Park area here involved, I must adhere to my former opinion, * * *.

Since the authority to purchase is the equivalent of the power to condemn, these conclusions of the district court may be accurately paraphrased as say-

ing, "I am unable to find that the General Appropriation Act may be construed by necessary implication to authorize the *purchase of land* in this instance." Since the sole basis for the conclusion is the fact that, as to some national parks, specific condemnation authority has been given, the true holding of the court is that the appropriation, so far as acquiring lands is concerned, must be read as limited to those particular national parks. The court has thus, by negative implication, narrowed the general authority granted by the appropriation to the Secretary of the Interior as to which parks to spend the money. As we will show, this unwarranted limitation is contrary to Congressional intent, as appears from the legislative history.

Congress had appropriated a flexible fund for the acquisition of lands any place within the boundaries of established national parks for several years prior to the appropriation in question to be used at the discretion of National Park Service officials. Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 81st Cong., 2d Sess., Making Appropriations for the Department of the Interior (hereinafter referred to as Senate Hearings), 195-196, 227-228. That fund is used to acquire land when it is advantageous for the government to do so "throughout the entire [national park] system." Senate Hearings, 226. In the appropriation for the fiscal year 1951, the House committee merged what had formerly been separate items for

“acquisition of lands”⁵ and “for construction of roads, trails,” etc. The committee report shows that the \$20,542,000 in these items included only two items for land acquisition in named projects and \$2,000 for water rights. The total amount adopted by the Senate for “Construction” was reduced to \$19,667,000. The Senate report on H.R. 7786 showed these differences between the two versions: the Senate decreased the sub-item “Buildings and utilities” by \$150,000; the Senate decreased the sub-item “Acquisition of lands and water rights” by \$1,000,000 in connection with Independence National Historical Park, Pennsylvania; but the Senate *increased* the “Acquisition of lands and water rights” sub-item by \$275,000. The last increase is explained in the report as follows: “The increase of \$275,000 approved by the committee is for acquisition of privately owned lands within the authorized boundaries of established national park areas.” S. Rept. No. 1941, 81st Cong., 2d Sess., p. 160, Cong. Doc. Series No. 11370. The conference report shows that the conferees approved the Senate amendment decreasing the total item “Construction” to \$19,667,000. The conferees in terms approved the reduction of \$1,000,000 concerning the acquisition of lands at Independence National Historical Park, Pennsylvania. The Senate amendments on the \$275,000 and \$150,000 sub-items were

⁵ The earlier acts, as to land acquisition, had read as follows:

“Acquisition of lands: For the acquisition of privately owned lands or interests therein within the authorized boundaries of established areas under the jurisdiction of the National Park Service * * *.” Interior Department Appropriation Act, F.Y. 1950, 63 Stat. 765, 793; *id.* 1949, 62 Stat. 1112, 1141.

not mentioned specifically, as they did not involve amending the text of the bill but those adjustments are reflected in the amount actually appropriated. The statement of the managers on the part of the House notes that the action on the \$19,667,000 amendment "will necessitate some flexibility to permit adjustment of items originally scheduled under * * * construction." H. Rept. 2991, 81st Cong., 2d Sess., pp. 34, 41, Cong. Doc. Series No. 11384. Under the Senate version, which became law, acquisition of the Kennedy land fits precisely the purpose of "acquisition of privately owned lands within the authorized boundaries of established national park areas."

Further confirmation of the flexible nature of the fund and of the Congressional intentions concerning it may be derived from the Senate hearings. The hearings establish that Congress understood this to be a fund which could be used to purchase land in *any of the national parks*. There is nothing to indicate Congress was otherwise limiting the fund or attaching strings. Mr. Newton B. Drury, Director of the National Park Service, asked the Appropriations Committee in his prepared statement to restore the \$275,000 "for general land purchases." He reminded the committee that Congress had for the past several years appropriated money "for the acquisition of privately owned lands located within the boundaries of the areas administered." Such lands constituted "one of the Service's most perplexing problems in the fields of management and protection." Senate Hearings, 195. The same language is used in the National Park Service's budget justification given to the Ap-

propriations Committee, with the statement that "Private holdings are subject to undesirable developments and use over which the Service has no control. * * * The Service cannot correct this condition or carry out its obligation to acquire the lands unless funds are made available for the purpose by the Congress." Senate Hearings, 204. Mr. Drury again referred to the \$275,000 item, describing it as "one of the most vital items." Senate Hearings, 223. In the justification which followed, it was pointed out that of the 21,709,000 acres in the entire national park system about 714,000 acres were still in private ownership. It was proposed that the \$275,000 item would be used "to acquire most urgently needed land in *various* areas, including * * * [listing some of the parks where land might be acquired]." Senate Hearings, 224. Senator Hayden, presiding at the hearings, had a perfect grasp of the adaptable character of the fund. "You could not say," remarked Senator Hayden, "in advance definitely that you were going to acquire anything at any of these places." Senate Hearings, 230. This statement came just after Mr. Drury had given the Senators a list of possible acquisitions with the \$275,000 fund. Then Mr. Drury stated, "Yes, those [listed parks] were given in our justification as examples. This is a flexible fund. Now you asked me about Colonial, and it may well be that there will be purchases there."⁶ "Senator Hayden. There may or may not? Mr. Drury. Yes, there may or may not." Senate Hearings, 230. When

⁶ This reference was to Colonial National Historical Park which was not on the list of examples.

Senator Cordon asked whether the item "Acquisition of lands and water rights" carried "an itemization of what acquisitions you intended to make," Mr. Drury answered, "Well, except for that \$275,000 item, it does." Senate Hearings, 241. In the Appendix hereto, *infra*, pp. 25-28, we print further quotations from the hearings making clear the Congressional intent.

These hearings indicate that this fund was available to purchase land within any national park, mostly on the basis of what might be available at a good price and what had to be purchased to prevent its development or use adverse to the best interests of the park. In the hearings Congress was notified of at least seven instances where the same appropriation had been spent in prior years to acquire land in a national park or monument when there was neither express authority in the act establishing the park or monument nor specific designation of the park in the appropriation used. Two of the instances had not only involved acquisition of land but use of condemnation proceedings as well. See Appendix, *infra*, pp. 26-27. The nature of the appropriation, flexible as it was, made it impossible for Congress to name each park or monument where it might be spent for that determination was left to the Secretary. Nor was it essential that Congress attach to the appropriation an authority to condemn in the process of acquiring the land. As the court said in *Barnidge v. United States*, 101 F. 2d 295, 297-298 (C.A. 8, 1939): " * * * As authority had already been conferred to procure real estate for public uses by condemnation, it would seem to have

been quite unnecessary to embody in this Act specific authority to acquire real estate by condemnation proceedings. We must assume that Congress had full knowledge of the Act of August 1, 1888, and of the interpretation that had been placed upon it by the courts.”

This history is a complete answer to the theory of the district court. The fact that Congress continued the same appropriation with knowledge of the administrative understanding as to purposes for which the fund could be used, including two specific instances of condemnation, constitutes, we believe, ratification of the administrative construction. Cf. *Brooks v. Dewar*, 313 U.S. 354 (1941).⁷

There is further the fact that in this very proceeding a judgment has already been entered on the basis of the appropriation which the district court here did not consider adequate authority for the purchase of land. That judgment awarded 35 acres of land to the United States (R. 23-25). The mere fact that this was a consent judgment does not change the picture, for “no land shall be purchased on account of the United States, except under a law

⁷ In recent years, a general policy has been expressed that lands should not be condemned, except in special situations, within national park boundaries without prior consultation with the committee. See H. Rept. No. 314, 83d Cong., 1st Sess., Cong. Doc. Series No. 11665, p. 22; H. Rept. No. 1628, 82d Cong., 2d Sess., Cong. Doc. Series No. 11576, p. 18; Hearings, Subcommittee of Committee on Appropriations, House of Representatives, Interior Department Appropriation Bill for Fiscal Year 1957, p. 243; Hearings, Subcommittee of Committee on Appropriations, United States Senate, Interior Department Appropriation Bill, 1954, pp. 2104-2111.

authorizing such purchase.” 41 U.S.C. sec. 14.⁸ Unless the general appropriations to acquire land anywhere within the national park system were authority to purchase land in the several instances just cited under 41 U.S.C. sec. 14 they were all illegal. Even more ridiculous, Congress would have continued to appropriate money in fiscal year 1951 after having been notified that the National Park Service planned to use the money in such places as Lassen National Park, California, Joshua Tree National Monument, California, Mount Rainier National Park, Washington, Rocky Mountain National Park, Colorado, and Kings Canyon National Park, California, when there was no authority to acquire such land except the appropriation act itself, and that act did not specifically name any of the parks. Clearly, in view of the entire legislative history as shown in the Senate hearings, Congress appropriated the money for this general land acquisition fund to be used to acquire land anywhere within the national park system, regardless of whether there was another statutory authority to acquire in a particular park, and even though Congress did not name specific parks where it thought the money might be spent.

⁸ Congress has delegated to the Comptroller General the function of determining whether a particular expenditure is within the authorization of the appropriation.

CONCLUSION

For the foregoing reasons it is submitted that the order of the district court dismissing the complaint of the United States in this condemnation proceeding should be reversed and the case remanded for the determination of just compensation.

Respectfully submitted.

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MAY 1959.

A P P E N D I X

There are numerous statements in the Senate hearings about the \$275,000 sub-item. Hearings before a Subcommittee of the Committee on Appropriations, United States Senate, 81st Cong., 2d Sess., Making Appropriations for the Department of the Interior, pp. 195, 204, 223, 224, 225-231, 241, 1485-1486, 1588. These excerpts are representative of the hearings:

It is recommended that the entire House reduction of \$875,000 for land acquisition be restored. The \$275,000 reduction for general land purchases is vitally important. For the past few years, the Congress has provided from \$200,000 to \$300,000 for the acquisition of privately owned lands located within the boundaries of the areas administered. These owned lands are subject to unsightly commercial development; they stand in the way of ultimate development of the parks and monuments; and they present one of the Service's most perplexing problems in the fields of management and protection. Values of these lands have increased considerably during the past decade because of the enormous increase in public use. They must not be subdivided for summer-home purposes or otherwise developed commercially if the best interests of the Government and the visiting public are to be served (pp. 195-196).

* * * Private holdings are subject to undesirable developments and use over which the Service has no control. * * * The Service cannot correct this condition or carry out its obligation to acquire the lands unless funds are made available for the purpose by the Congress (p. 204).

* * * The national park system contains a gross area of approximately 21,709,000 acres, of which approximately 714,000 acres are in non-federal ownership. * * * It is proposed to use the \$275,000 to acquire most urgently needed land in various areas, including * * * [listing several national parks] (p. 224).

Senator HAYDEN. There is an unidentified item here of "Acquisition of privately owned lands in various areas" of \$275,000.

Mr. DRURY. That is right. That is for general purchases. That fund is used to acquire land when it is advantageous for the Government to do so throughout the entire system. * * * We can submit for the record a list of all the lands that have been acquired since that appropriation was made (p. 226).

There follow lists showing the parklands acquired with the general acquisition funds for fiscal years 1948, 1949 and 1950. The lists show the name of each park or monument where land has been acquired, the number of acres acquired in each, and the "contract price." There is a footnote for the several instances where the price is omitted stating, "Settlement price to be determined." There are also under both the 1948 and 1949 tabulations similar statements, as follows:

Cost of lands acquired by contract, under contract, *condemnation award* and *estimated condemnation award* is approximately 86 percent of appraised values (pp. 227-228).

For the three years there are listed seven instances where this general acquisition fund has been used to acquire land without there being any authority other than this general fund to acquire such land by pur-

chase or condemnation.¹ The instances referred to are: (1948) Arches National Monument, Glacier Bay National Monument, Chaco Canyon National Monument and Shiloh National Military Park; (1949) Carlsbad Caverns National Park and Prince William Forest Park; (1950) Lassen Volcanic National Park. Although the lists presented to Congress make it clear that the lands acquired with this general fund were obtained both by purchase and condemnation, such lists do not distinguish which tracts were acquired by each method. A check of the Department of Justice and Department of the Interior files confirmed that in at least two of the seven listed instances condemnation proceedings were used: (1948) Chaco Canyon National Monument, *United States v. 112.98 Acres of Land &c.*, Civil No. 1522, D. of New Mexico (use of condemnation for quieting title); (1949) Carlsbad Caverns National Park, *United States v. Elizabeth M. & Ernest E. Scoggin &c.*, Civil No. 1672, D. of New Mexico.

Senator CORDON. May I inquire whether, in your justification before the House committee your item "acquisition of lands and water rights," where you asked for an increase of from \$822,922 in 1950 to \$4,827,000 in 1951, carries an itemization of what acquisitions you intended to make with the full amount of the request?

Mr. DRURY. Well, except for that \$275,000 item, it does. * * * (p. 241).

Representative LEMKE. * * *

There is another thing that I am interested in, and that is the acquisition of lands generally for the national parks.

¹ While there is authority to condemn land needed to complete national monuments, this authority is limited to instances where the money for such condemnation has been donated, and thus would not be applicable to appropriated funds. 16 U.S.C. sec. 433c.

Restoration of the \$275,000 for the general acquisition of privately owned lands within the authorized boundaries of areas in the national park system is urgently needed.

Although the amount requested is small in comparison to the estimated \$30,000,000 value of the approximately 550,000 acres of such lands in the system, it, if approved, would allow the National Park Service to continue, in a small way, as it has during the past 3 years to acquire:

- (1) Those tracts that stand in the way of development or proper use of the park or monument areas in which they lie;

- (2) Those tracts that are in danger of being developed adversely to park standards and principles; and

- (3) Those tracts that can now be acquired at bargain prices because the owners are anxious to sell (p. 1485).

No. 16,179

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	}	<i>Appellant,</i>
VS.		
DAN T. KENNEDY,		

**Appeal from the United States District Court for the
District of Alaska, Third Division.**

BRIEF FOR DAN T. KENNEDY, APPELLEE.

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FILED

OCT - 7 1959

PAUL P. O'BRIEN, CL

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No. 16,179

IN THE

**United States Court of Appeals
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UNITED STATES OF AMERICA,	}
vs.	
DAN T. KENNEDY,	
	<i>Appellant,</i>
	<i>Appellee.</i>

Appeal from the United States District Court for the
District of Alaska, Third Division.

BRIEF FOR DAN T. KENNEDY, APPELLEE.

I.

**STATEMENT AS TO JURISDICTION AND AS TO
PLEADINGS IN THE DISTRICT COURT.**

Dan T. Kennedy, the appellee herein, accepts the statements made in its brief by the United States of America, the appellant, as to the jurisdiction of the District Court and as to the jurisdiction of this Court and concerning the pleadings and proceedings had in the District Court and the opinions of that Court.

II.

STATEMENT OF THE CASE.

This action is one in condemnation whereby the United States of America as plaintiff seeks to take certain real property, more particularly described in plaintiff's complaint and amended complaint, as a part of Mount McKinley National Park. The property sought to be taken is owned in fee simple by appellee Dan T. Kennedy. It consists of five acres and is situated adjacent to the McKinley Park Air Strip and close to McKinley Park Station on the Alaska Railroad. It is located East of the Alaska Railroad right-of-way and West of the Nenana River. (See Exhibit 3 attached to plaintiff's amended complaint, R 30.)¹

III.

SUMMARY OF ARGUMENT.

This case is of considerable importance to appellee in that the United States of America is seeking to take his property which he does not desire to sell. In Kennedy's view of the matter, proper proceedings have not been had to authorize the taking of the property by the United States of America and he believes the proposed taking is without legal authority.

In addition to being of considerable importance to Mr. Kennedy, the appellee, this case is of much im-

¹The map, Exhibit 3, is not made a part of the printed record but the original is in the custody of the Court. Reference to it is found at R. 31.

portance to the executive officers of the United States of America in that if the power of taking here claimed were sustained, the power of executive officers to take private property for public use would be greatly extended beyond the limits heretofore set by the courts on such power. On the other hand, this case is of supreme importance to the people of the United States of America, far beyond the parties to this action, by reason of the fact that if the government's position here should be sustained, the power of executive officers of the United States of America to take private property for public use would be almost unlimited and beyond practical control by Congress as the legislative branch of the government.

The government here concedes, at least impliedly, that there is neither any general nor any specific statutory authority for the taking of private property for public use with reference to McKinley National Park. No contention is made by the United States in this action that it has Congressional authority to condemn the property here involved by reason of any necessary implication from specific authority given by Congress to the National Park Service.

The claim of the government in this case, as is disclosed by its brief, is that its legislative authority to procure the Kennedy land is the general appropriation act for the year 1951 wherein a lump sum amount was appropriated for use of the National Park Service for the acquisition of lands, interests therein, improvements and water rights. The claim of the government is that by virtue of the appropria-

tion act, the National Park Service was authorized, in its sole discretion, to acquire any private property that it wished to acquire, wherever such property might be located, so long as it was located in the boundaries of any national park or of any area administered by the National Park Service, and that it could acquire any and all of such property at any price that it saw fit to pay and without further authority from or interference by Congress. In other words, it is claimed that Congress gave the National Park Service a blank check for \$275,000.00 which could be used in any way the National Park Service saw fit in acquiring private holdings in any of the national parks or in any of the areas administered by the National Park Service.

The power of eminent domain is a power inherent in the United States of America as a sovereign government. This power is subject only to the limitations contained in the Fifth Amendment to the United States Constitution to the effect that private property may not be taken for public use except on payment of just compensation. Accordingly it is conceded that Mr. Kennedy's property at McKinley National Park, as well as all other property under the jurisdiction of the United States, may be taken under condemnation proceedings when the power to take has been properly given by Congress and whereby the condemnation proceedings are conducted with due process of law.

There is a distinct difference between the right of the United States of America to exercise its inherent power of eminent domain and the right of any par-

ticular official or agency or department of the United States of America to exercise that right on behalf of the United States of America. The general statute which authorizes officers of the United States of America to exercise the right of eminent domain on behalf of the United States of America is explicit to the effect that it is only in cases in which the officer is authorized to procure real estate for public use that he has any right or power to acquire such property by condemnation.

While the right of the United States of America to exercise the power of eminent domain is inherent, it has been repeatedly held, and stands without dispute, that the exercise of the right of eminent domain in the first instance is legislative. Executive officers may act to condemn property only where the authority to acquire property has been given those officers by specific authority or by necessary implication.

Statutes which undertake to authorize appropriation of private property for public use are strictly construed. The power of eminent domain should be exercised only where the plain letter of the law permits it and under a careful observance of the formalities prescribed for the owner's protection. Express legislative power is needed for these purposes and any act allegedly authorizing condemnation of private property for public use must be express and clear. If there are doubts as to the extent of the power given by the statute, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of the power. The

fact that it may be convenient to the officials of the government to exercise the power is unimportant, and will not sustain the power. Unless power to procure the property is given by express authority of law, or by necessary implication from the power given, then the power to acquire property by eminent domain has not been given and an attempted exercise of condemnation proceedings to take the subject property cannot be sustained. The general statute relative to condemnation proceedings, 40 U.S.C., 257, by itself gives no authority to any officer to condemn private property for public use. This proposition was conceded by the government in the District Court and in spite of some general language to the contrary, is probably conceded by the government on this appeal.²

The government in this case relies solely upon Section VII of the general appropriation act for fiscal year 1951 as its authority for taking the Kennedy property. In particular it relies on that portion of the act which reads:

“... and the acquisition of lands, interests therein, improvements and water rights, . . . , \$19,667,000.00 . . .”

²On page 15 of its brief the government uses the following language: “But the fact that the Department of the Interior has alternative authorities in some cases does not negate the existence of 40 U.S.C. sec. 257 nor destroy its validity where the Department must rely on that authority alone.” In view of the wording of the statute where it is said: “In every case where the Secretary of the Treasury or any other officer of the government *has been*, or hereafter shall be, authorized to procure real estate, etc. . . .” and in view of the law on this subject, we do not believe the government is serious in its statement that this statute authorizes any procurement of property “where the Department must rely on this authority alone”.

A goodly portion of appellant's brief is taken up with cases cited to the proposition that the government's power to condemn is coextensive with its power to purchase. (See brief, page 11.) That matter is not in dispute. Appellee concedes that the cases generally hold that the power of the United States of America to condemn property is coextensive with its power to purchase the property. Our quarrel with the government here is that we dispute the claim of the government that the National Park Service, through the Secretary of the Interior, ever had, or now has, any right to acquire the Kennedy property at Mount McKinley National Park, Alaska, either by condemnation or by purchase.

Appellant in its brief argues that the legislative history of the general appropriation act for the United States for fiscal year 1951 shows that Congress gave power to the National Park Service in its discretion to purchase any lands in private ownership which it might desire so long as such lands were located in the boundaries of any national park or without the boundaries of any area under the jurisdiction of the National Park Service. Accordingly, it is argued that it had the right to purchase the Kennedy property, or if it so chose to, to condemn it.

The legislative history of the general appropriation act for fiscal year 1951 will not support the government's contention. A reading of the legislative history demonstrates conclusively that the National Park Service considered it already had authority to acquire all the land it desired to acquire and that the requested

appropriation was merely a request for funds to purchase the lands desired. Those lands desired by the Service were specifically listed in the request for the appropriation. They did not include the Kennedy land or any land relative to Mount McKinley National Park.

Since the National Park Service has been given no general or special authority to acquire lands at McKinley National Park, and no authority to so acquire property at that place has been claimed or is shown to have been given by necessary implication from powers given to or required of the National Park Service, it follows that the National Park Service has no power to acquire the Kennedy property at all, either by purchase or condemnation. Thus it is clear that plaintiff's amended complaint stated no claim in favor of the government and against the property or against the appellee, Dan T. Kennedy, and that the order of the District Court in dismissing the action was entirely proper and should be affirmed by this Court.

IV.

ARGUMENT.

Appellee in this proceeding has conceded and now concedes the following propositions of law:

A. The United States of America as a sovereign government has the inherent power to exercise the right of eminent domain as to any property under the jurisdiction of the United States of America, includ-

ing the property belonging to appellee, Dan T. Kennedy, and situated at McKinley Park Station, Alaska, subject to the constitutional limitations contained in the Fifth Amendment to the Constitution of the United States of America as to taking of private property for public use without just compensation.

B. The right of the United States of America to condemn property under eminent domain proceedings, where authority has been given by Congress to acquire the land, is exercised under the provisions of what is now 40 U.S.C. § 257, and in procedural matters is governed by Rule 71(a) of the Federal Rules of Civil Procedure.

C. Title 40 U.S.C., § 257, by itself does not authorize the acquiring of property by an executive official, agency or department. Congressional sanction is required to authorize the acquiring of property by eminent domain. This required Congressional sanction may be given by general acts authorizing a particular executive officer to acquire property or by special acts giving the same authority under special circumstances. The Congressional authority to acquire property, and thus to condemn property, may be given by necessary implication from authority given or duties required by Congress of the particular department or agency or officer involved. Such authority may also be evidenced by appropriations made by Congress. Cases illustrative of the power to acquire, and therefore to condemn, under necessary implication from authority given or duties required, include cases such as *United States v. Threlkeld*, 72 Fed. (2d) 464, and *Polson Logging*

Co. v. United States, 160 Fed. (2d) 712, cited and discussed in appellant's brief. Cases illustrative of the proposition that an appropriation act may be used as evidence of Congressional authority given to acquire property, and therefore to condemn private property, include the *Threlkeld* and *Polson* cases above cited, and other cases cited by appellant in its brief, such as the case of *Seneca Nation of Indians v. Brucker*, 162 Fed. Supp. 580, and *United States v. 5,677.94 acres of land*, 152 Fed. Supp. 861. Appellee has no quarrel with these cases or with the propositions of law therein set forth. The opinions in those cases were perfectly proper under the facts of the particular cases.

D. The cases generally hold that the power of the United States of America to condemn private property for public use is coextensive with its power to purchase the property. (See cases cited by the United States government as appellant on page 11 of its brief with reference to this proposition.)

E. The question of "just compensation" is not at issue in this matter at this time. The above entitled action was dismissed by the District Court on the ground that plaintiff's amended complaint, as a matter of law, did not state a claim in favor of the plaintiff, United States of America, and against the land in question, or, against appellee Kennedy, upon which any relief might be granted by the Court. No answer has been made to plaintiff's amended complaint. If this Court should affirm the action of the District Court, then the matter of "just compensation" will not arise. On the other hand, if it should finally be

determined that the District Court erred in dismissing the action as against the Kennedy property, then appellee Kennedy, as defendant, will be required to answer plaintiff's amended complaint and to defend the action. The issue of "just compensation" will then be tried.

Having made concessions as hereinabove set forth, it is the purpose of appellee in this brief to demonstrate that the United States of America as plaintiff, in its amended complaint, stated no claim against the Kennedy property, or against Kennedy, upon which any relief could be granted by the Court and accordingly that the action of the District Court in dismissing the action as to such property and as to the defendant, Dan T. Kennedy, was right and proper and should be affirmed by this Court.

We have previously said that the power of the United States of America to exercise the right of eminent domain is inherent and subject only to the limitations set by the Constitution of the United States. Having made this concession, it does not follow that a particular officer of the United States or a particular department or agency of the United States has any right or authority whatsoever to exercise the right of condemnation on behalf of the United States of America in a particular case. (*United States v. 458.95 acres of land, etc.*, 22 Fed. Supp. 1017.)

The United States of America recognizes the right of its citizens to own and to hold property without interference from the United States of America except

where Congress has authorized the taking of that property. Where the authority to take is given that authority is paramount, subject of course to taking by "due process of law". The Congress of the United States as the legislative branch of the United States government must in the first instance grant the authority to the particular department or agency or officer of the United States of America before that officer or agency or department may exercise the right of eminent domain on behalf of the United States of America.

May we here quote from the case of *United States v. Rauhers*, 70 Fed. 748, where the following language appears:

"A fundamental principle of law controlling all matters of this character is that every statute which undertakes to appropriate in any manner the property of private persons for public use, must be strictly construed. One of the great aims of government is to secure to each citizen the enjoyment of his estate. On the other hand, in cases of public necessity, the right of the individual must yield to the right and demand of the public; but, since that demand is in derogation of private right, it must be closely scrutinized, and the expression of legislative purpose in which it is conveyed, must be strictly construed.

'So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.' Cooley, Const. Lim. p. 651.

“The same eminent authority also declares :

‘Express legislative power, moreover, is needed for these purposes. It will not follow that, because such things are convenient to the accomplishment of the general object, the public may appropriate them without express authority of law ; but the power to appropriate must be expressly conferred.’ *Id.* p. 666.

“It is elsewhere stated that :

‘The act authorizing condemnation must be express and clear. If there are doubts as to the extent of the power, after all reasonable intendments in its favor, the doubts should be resolved by a decision adverse to the claim of power.’ *Mills, Em. Dom.* § 48.

“The supreme court of Massachusetts sustains this proposition :

‘It must appear that the government intended to exercise this high sovereign right by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognized the right of private property, and mean to respect it ; and, under our constitution, the act conveying the power must be accompanied by just and constitutional provisions, for full compensation to be made to the owner.’ *Boston, etc., R. Corp. v. Salem, etc., R. Co.*, 2 Gray, 36.”

and again at page 751, the following language is used :

“It is rarely the case where eminent text writers, the courts and the legislature itself coincide so strongly in the recognition of a legal principle,

that principle being that there must be express authority in the secretary of the treasury, when charged with such matters, to procure land for public use, before he is authorized, in his discretion, to proceed by condemnation for that purpose."

See also *United States v. A Certain Tract of Land in Cumberland Tp.*, 70 Fed. 942, where the following language appears:

"The power of the government of the United States to take private property for public use, upon making just compensation, is unquestionable; and, for the present purpose, I assume, without deciding, that the use alleged to be contemplated in this instance is a public use, and that the taking proposed would be compensated. The power referred to is, however, not exercisable at all in the absence of legislative authorization."

In *United States v. Fiske Building et al.*, 99 Fed. Supp. 592, 594, it is said:

"However, the power to condemn may be exercised only when explicitly authorized by statute . . . , unless such authority exists the petition must be dismissed."

In *United States v. Threlkeld*, 72 Fed. (2d) 464, 466, cited and quoted by the appellant in its brief, it is said at page 466:

"Appellee contends that the power of eminent domain should be confined to the express terms or clear implication of the grant, and the cases of *United States v. Rauers* (D.C.) 70 F. 748, and *United States v. A Certain Tract of Land in Cumberland Tp.* (C.C.) 70 F. 940, are relied

upon to sustain its application. We recognize that doctrine and are in accord with it, but for the reasons stated we think the power is clearly conferred here.”

In *Youngstown Sheet & Tube Company v. Sawyer*, 103 Fed. Supp. 569 (affirmed 197 Fed. (2d) 582, 343 U.S. 579) at page 574 it is said:

“The grants of executive power are necessarily in general terms in order not to embarrass the executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.”

and again at page 575, it is said:

“Defendant also contends that the Executive has an inherent power in the nature of eminent domain, which justifies his action. The power of eminent domain is a Congressional power. As stated by the Supreme Court in *Hoe v. United States*, 281 U.S. 322, 323, 336, 31 S. Ct. 85, 89, 54 L. Ed. 1055, ‘The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government.’ The President therefore does not have the power of eminent domain, and the cases defendant cites do not disclose that he has anything in the nature of such power. . . .”

In *United States v. West Virginia Power Company*, 33 Fed. Supp. 756, 759, it is said:

“The power of eminent domain is arbitrary in character and subversive of the right of private

property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed. *United States v. A Certain Tract of Land*, C.C., 70 F. 940; *Delaware, L. & W. R.R. v. Morristown*, 276 U.S. 182, at page 192, 48 S. Ct. 276, 72 L. Ed. 523, and authorities cited therein. So it must first clearly appear from the petition that the federal officers are authorized to institute this proceeding and upon what that authority is based. *Dept. Public Works v. Lewis*, 344 Ill. 253, 176 N. E. 345.”

See also:

United States v. 8557.16 acres of land in Pendleton County, West Virginia, 11 Fed. Supp. 311;

Wayne County Court, West Virginia v. Louisa and Fort Gay Bridge Company, 46 Fed. Supp. 1;

Carmack v. United States, 135 Fed. (2d) 196.³

We have found no general statute which authorizes the Secretary of the Interior, on behalf of the Na-

³The *Carmack* case was remanded to the District Court for re-trial and on re-trial the District Court held that the attempted taking was an arbitrary and unnecessary act and the court of appeals affirmed on the ground that the Federal Works Administrator and the Postmaster General lacked authority to take the particular land sought to be condemned. The Supreme Court of the United States in 329 U.S. at 230, held that the executive officers in question had been given the requisite authority by Congress under general acts.

tional Park Service, to condemn private property for public use. No such statute has been cited in these proceedings. There is a general statute which authorizes the Secretary of the Interior to secure private property on behalf of the National Park Service for the specific purpose of acquiring rights of way for constructing, improving and maintaining roads within the authorized boundaries of any area of the national park system and miscellaneous areas. See 16 U.S.C. § 1b(7), act of August 8, 1953, 67 Stat. 495. There are also statutes giving the Secretary of the Interior, on behalf of the National Park Service, the right to acquire private property within various of the national parks. The District Court in its opinion (R 42) and in its supplementary opinion (R 58), has cited some of these particular statutes. See Section 157a of Title 16, U.S.C.A., Big Bend National Park, which is illustrative of one version of these statutes. It reads:

“The secretary of the interior is authorized to acquire, in such manner as he shall consider to be in the public interest, any land, or interest in land situated within Sections 15 . . . etc.”

Title 16, Section 404c is illustrative of another version of these special statutes with reference to particular parks wherein it is provided:

“The secretary of the interior is hereby authorized in his discretion to acquire for inclusion within the Mammoth Cave National Park by purchase, condemnation, or otherwise, any lands, interest in lands, and other property within the

maximum boundaries thereof as authorized by Sections . . .”

There is no special statute authorizing acquiring of property either by purchase or by condemnation with reference to Mount McKinley National Park.

The United States seeks to justify its attempt to acquire the Kennedy property herein concerned by the provisions of the general appropriation act for the year 1951, the act of September 6, 1950, 64 Stat. 595, 679, Chapter VII, wherein certain moneys are appropriated for the use of the National Park Service in the following language:

“For construction and improvements . . .; and the acquisition of lands, interests therein, improvements and water rights; to remain available until expended, \$19,667,000.00 . . .”

Appellant relies heavily on the case of *Polson Logging Co. v. United States*, 160 Fed. (2d) 712, decided by this Court and upon the case of *United States v. Threlkeld*, 72 Fed. (2d) 464, which is followed by the *Polson* case. As we have previously said, we have no quarrel with those cases. On the facts and under the statutes there involved those cases are sound. However, and as we have pointed out, there is no question in this case of authority implied from authority given. The appropriation act concerned in the *Threlkeld* case specifically appropriated money for the construction of roads and trails and the Court held that that appropriation, together with the general duty of the Secretary of Agriculture to protect and manage the na-

tional forests, gave the secretary implied power to acquire ground necessary to construct the required roads. The *Polson* case involved the same duties of the secretary to protect and manage the forests, together with his duties under the Federal Highway Act. The appropriation act made money available to the secretary to carry out the provisions of the Federal Highway Act. The Court found that the term "construction" included "costs of rights of way". This case, like the *Threlkeld* case, held that the requisite authority to acquire land must be implied from the authority given and duties required. Both of these cases are clearly distinguishable from the case now being considered and neither stands as any authority for the government's position here.

The government in its brief analyzes at some length the legislative history of the general appropriation act for fiscal year 1951, citation as above. From that legislative history the government claims that the Congress of the United States appropriated the sum of \$275,000.00 for the purpose of eliminating private holdings in the national parks and in areas under the jurisdiction of the National Park Service and that such sum was a discretionary fund which could be used by the Director of the National Park Service in purchasing or in condemning property which might be selected anywhere within the National Park system by the secretary.

We submit that a fair reading of the Congressional proceedings with reference to this appropriation act will not justify the conclusion of the United States

as to the alleged discretionary authority. Furthermore, we believe that upon application of the law, as hereinabove cited, that the general appropriation act for 1951 does not authorize the taking of Mr. Kennedy's land for Mount McKinley National Park, Alaska. The alleged authority of the United States of America to take the property is to be strictly construed. The power to appropriate Mr. Kennedy's property has not been expressly conferred and does not arise by necessary intendment or implication from the provisions of the subject appropriation act. All doubts as to the extent of the power to acquire, and thus to condemn, after all reasonable intendments in its favor, should be resolved in favor of the owner of the property and against the claimed power to acquire by condemnation. Congress having given authority to the Secretary of the Interior to acquire property, and if necessary to condemn property, in certain specific instances, has denied the power to the secretary to acquire property by condemnation except where the authority is specifically given.

Turning to the history of the legislative act, we find that the National Park Service for fiscal year 1951 requested a total of \$275,000.00 for the purpose of acquiring private properties within the various national parks and monuments. The requested appropriation, together with other requests, was deleted by the House of Representatives from the appropriation. The Senate restored the requested sum for this purpose. On conference between the House and Senate committees the Senate version of the act was adopted.

(See conference report, page 41, amendments 298 and 299.) The Senate version was contained in the bill as adopted.

The officials of the National Park Service, including Mr. Drury, the Director; Mr. Tolson, the Assistant Director; Mr. Demaray, the Associate Director, and Mr. Beasley, the acting Director of the Budget, all testified relative to this requested appropriation. Written exhibits and justifications as well as oral testimony were presented. A reading of the testimony will disclose that Mr. Drury and Mr. Tolson believed this appropriation to be of the utmost benefit to the National Park Service and that Mr. Drury, at least, considered it a flexible fund to be used in various areas under his jurisdiction. See for example his testimony at pages 225, 226, and 227 of the Senate hearings. However, the hearings show that the requested appropriation was to be used in certain designated areas. At the request of Senator Cordon, a table was furnished designating the areas and the approximate acreage and the estimated price of the land desired. (Senate hearings, 230.) No land with reference to Mount McKinley National Park, was included and the anticipated cost of lands which were included was \$300,000.00, \$25,000.0 above the requested appropriation for this purpose.

The hearings with reference to the 1951 request by the National Park Service for funds for land acquisition show that this requested appropriation was to be used to acquire lands where the owner was willing to sell and where the government could get a bargain

by buying the land. See for example, page 230 of the Senate hearings where Senator Hayden in questioning Mr. Drury used an example with reference to land at Grand Canyon where an owner had had an exalted idea of the value of his land but later decided he could take a reasonable sum and the land was later acquired that way. The Senator said: "It depends on whether you make a reasonable deal with the owner." Mr. Drury replied: "Yes, we can give an approximate schedule of what we intend to do," and cites as an example lands in Glacier Park as included in the schedule of properties to be acquired with the requested appropriation. See also testimony of Mr. Drury before the House committee (Hearings, House of Representatives, 357) "That work has picked up, and we have lots of them that we are handling where we are getting bargains. We are not going to buy expensive land. That is the policy." The National Park Service has never consulted Mr. Kennedy concerning purchase of his ground. So far as he knows it has never had his ground appraised or set a proposed purchase price for it.

In any case it is clear that the National Park Service in requesting the \$275,000.00 appropriation for land acquisition was not asking for any additional authority to acquire lands. The Service was merely attempting to secure necessary funds to buy lands for which it already had purchase authority. In the House hearings, Mr. Beasley at pages 1649 and 1650 of the hearings report, with reference to the requested item for land acquisition, used the following language:

“This item consolidates all the appropriations contained in the 1950 appropriations act for construction and land acquisition activities of the National Park Service . . . The language proposed for this item does not in any way broaden the authority heretofore carried in the appropriation items for this purpose.”

Mr. Norrell asked a question of Mr. Beasley as follows:

“It simply constitutes a consolidation of those items and gives you no additional power?”

Mr. Beasley replied: “Yes, sir.”

In the Senate hearings, Senator McCarran asked a question of Mr. Drury as follows (Senate Hearings 230):

“Have you not a statute under which you can acquire land within the national parks?”

Mr. Drury replied: “Yes, the act of 1916.”

Senator McCarran asked:

“And does not that include provisions for the acquisition of land for national parks?”

Mr. Drury replied: “It gives us the authority, yes, Senator; *but we still, of course, have to get the appropriations.*”

Senator McCarran asked:

“And you have to get the authority from the Congress to create the park, do you not?”

Mr. Drury answered: “Yes, when the park is created, the act creating it, generally, I think universally, gives us the authority to acquire the land within its boundaries.”

Nowhere in the Congressional proceedings is it suggested that the fund of \$275,000.00 for acquisition of lands is to be used as a discretionary fund giving the National Park Service authority to purchase property in areas under its jurisdiction wherever it might deem it desirable or that the fund was to be used anywhere except in areas listed in the budget request or in areas where the National Park Service, through the Secretary of the Interior, already had authority to acquire private property under specific statutes applying to various of the parks. The claim that the appropriation act gave additional authority to acquire lands which were not listed in the request came as an afterthought.

The appropriation statute cited by the government as its authority for procuring the Kennedy land, giving that appropriation act every reasonable intendment, cannot be said to express any clear and definite intention of Congress to give authority to the National Park Service to acquire the Kennedy property.

We desire to point out that Congress in at least two instances since the adoption of the 1951 appropriation act, has adopted specific legislation whereby the Secretary of the Interior has been authorized to acquire private property within the areas under the jurisdiction of the National Park Service. One of these statutes is a general statute adopted in 1953, subsection 7 of section 1b of Title 16 U.S.C.A., whereby Congress gave the Secretary general authority to acquire rights of way within the national park areas for the purpose of constructing, improving and maintaining

roads. The other is Public Law 85-358, 85th Congress, adopted March 28, 1958, cited by Judge Hodge in his opinion, where Congress gives the Secretary of the Interior the right to acquire any non Federal land or interests in lands within the area authorized and set aside as the Petrified Forest National Park, in the State of Arizona. These statutes would have been completely unnecessary if the Secretary had the authority claimed for him by the government. The appropriation act does not give or evidence the giving of the power to take the Kennedy land.

The act which originally created Mount McKinley National Park, now Sec. 347 of Title 16 U.S.C.A., was amended in 1932 by what is now Sec. 355 of Title 16 U.S.C.A. which changed the boundaries of the Park. This amendment established the west boundary of the Alaska Railroad as the eastern boundary of the park but added the following proviso:

“Provided, however, that such isolated tracts of land lying east of the Alaska Railroad right of way and the west bank of the Nenana River between the north bank of Windy Creek and the north park boundary as extended eastward are also included in said park; . . .”

The Kennedy land is between the Alaska Railroad right of way and the Nenana River. We can only guess as to what was intended when Congress used the words: “such isolated tracts of land, . . .”. If it was meant to include all the land in the area described, Congress would have no doubt said so. If it was meant to include “isolated tracts” in private owner-

ship, including the Kennedy land, we believe that appropriate language would have been used to express that idea. It seems more likely that Congress intended to include in the Park only those "isolated tracts" of land situated in the area between the river and the railroad which were still a part of the public domain.

The National Park Service for many years has taken the position that the Kennedy property is in Mount McKinley National Park. The map attached to plaintiff's amended complaint shows it as being in the Park. Appellant throughout these proceedings assumes that the Kennedy property is within Mount McKinley National Park boundaries.

In any case the original act creating Mount McKinley National Park, as well as the act which amended the boundaries of that park, specifically protected vested private rights within the respective areas and provided that "any such claimant, locator or entryman" should not be affected by the creation of or by the enlargement of the park and should have the full use and enjoyment of his land. (See Sec. 348 of Title 16, U.S.C.A., as to the original act and the second proviso at the end of Sec. 355, Title 16, U.S.C.A., with reference to the same matter on the extension of the park boundaries.)

Appellee in the District Court raised the question as to whether his property was or was not within the boundaries of Mount McKinley Park. The Court refused to decide that question as being unnecessary to the decision which was made.

If the Kennedy property is not within the boundaries of Mount McKinley Park, that fact alone defeats

this action. Even under the contention of the government the appropriation of \$275,000.00 was to be used only to acquire property in areas under National Park Service jurisdiction.

However, the District Court did hold that in view of the reservations made by statute concerning vested rights that if Congress had intended to authorize the Secretary of the Interior to take private property with reference to Mount McKinley National Park that it would have done so by specific statute, as it did do with reference to other parks and areas. The reasoning of the trial court is sound.

The same reasoning applies to the contention that the 1951 appropriation act authorized the National Park Service to acquire the Kennedy ground. Since that act said nothing about the Kennedy ground or about any land at Mount McKinley National Park, and since the legislative history of the appropriation act is silent as to the Kennedy land and as to any land with reference to Mount McKinley National Park, the appropriation act may not be used as authority to condemn the Kennedy ground in which Mr. Kennedy has a vested right by fee simple ownership acquired before the boundaries of the park were extended.

In conclusion may we state as follows: The government here has cited no general or special act authorizing the condemnation of any land with reference to Mount McKinley National Park. The claimed right to condemn under authority of the 1951 appropriation act is not valid authority for taking the Kennedy property at Mount McKinley, Alaska. Neither the

appropriation act nor its legislative history indicates any intention by Congress to authorize the purchase or condemnation of the Kennedy land. The fact, if it is a fact, that money is available to purchase the Kennedy property, as set forth in the letter of the Interior Department's Solicitor to the Attorney General (R. 35) avails appellant nothing. The appropriation act does not plainly and clearly give to the Secretary any power to acquire the Kennedy property. As is said in *United States v. West Virginia Power Co.*, 33 Fed. Supp. 756, 759, above cited, authority will not be deduced "from any ambiguous language or by doubtful inference." Construing the statute against the claimed power to take, as we must, and in the light of express statute protecting Kennedy's vested rights in the property, the government has no right at this time to take the Kennedy property and plaintiff's amended complaint states no claim for relief. The District Court did not err in dismissing the action and its judgment should be sustained.

If the National Park Service wants the Kennedy land, and can justify its acquisition, it can and must go to Congress for that authority. If the authority to purchase is given by Congress, Kennedy will have no complaint as to the taking of his land and the land may be acquired under due process of law.

Dated, Anchorage, Alaska,
September 21, 1959.

Respectfully submitted,

DAVIS, HUGHES & THORSNESS,

By EDWARD V. DAVIS,

Attorneys for the Appellee.

No. 16181 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESSE LEE ROBINSON and TOM LOWE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16181

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESSE LEE ROBINSON and TOM LOWE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

The Court found appellants guilty on both counts of a Two-Count Indictment on May 1, 1958 after trial in the United States District Court for the Southern District of California [Tr. 136].¹ Count One charged that on or about November 21, 1957 the appellants did, after importation, knowingly and unlawfully receive, conceal and transport, and facilitate the concealment and transportation of a certain narcotic drug, namely, approximately 150 grains of heroin, in violation of United States Code, Title 21, Section 174. Count Two charged that on or about November 21, 1957 the appellants did, after importation, knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 150

¹Tr. refers to the Reporter's Transcript of Proceedings; C. Tr. refers to the Clerk's Transcript.

grains of heroin, to Delis Cammack, in violation of United States Code, Title 21, Section 174 [C. Tr. 1]. On June 2, 1958 the Court sentenced appellant LOWE to five years on each count, to run concurrently, and appellant ROBINSON to ten years on each count, to run concurrently [C. Tr. 27-28]. The District Court had jurisdiction under Section 3231, Title 18, United States Code. Appellants filed notice of appeal within the time permitted by law [C. Tr. 37-38]. This Court has jurisdiction under Section 1291, Title 28, United States Code.

I.

The Evidence Should Be Viewed Most Favorably to the Government.

The Court should not weigh the evidence or pass on the credibility of witnesses. Therefore, the convictions should be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

United States v. Glasser, 315 U. S. 60, 80 (1942);

Dean v. United States, 246 F. 2d 335, 336-337 (8th Cir., 1957);

United States v. Brown, 236 F. 2d 403, 405 (2d Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), cert. den. 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), cert. den. 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

O'Leary v. United States, 160 F. 2d 333 (9th Cir., 1947).

II.

The Evidence Was Sufficient to Convict Robinson on Count Two.

Taking the view most favorable to the Government, the evidence showed that:

ROBINSON had been convicted of two narcotics felonies [Tr. 121]. He had sold narcotics to Delis Cammack, the principal Government witness [Tr. 25].

Cammack called ROBINSON around noon on November 21, 1957. Cammack told ROBINSON that he "would like to see him and get a half a pint . . ."; ROBINSON asked him "to . . . come around to his [ROBINSON's] house" [Tr. 42-46].

ROBINSON, therefore, knew that "half a pint" meant half an ounce of heroin. Cf. *United States v. Alexander*, 219 F. 2d 225, 227 (7th Cir., 1955), where the Court said:

"If the defendant were innocent of all guilty knowledge she would wonder what Durham meant when he said he wanted 'to get three shirts.'"

Cammack went to ROBINSON's house. He had been there before. ROBINSON told him "the reason he didn't say much on the telephone [was] because a friend of his had been convicted through a telephone conversation." Cammack again said he would like to get half an ounce of heroin. ROBINSON told him to call TOM LOWE and gave him LOWE's telephone number [Tr. 46-47]. Cammack had known TOM LOWE since July, 1957 [Tr. 130].

Cammack called ROBINSON a second time around 1:45 P.M. He told ROBINSON that he had lost LOWE's phone number and asked for it again. ROBINSON gave it to him. He also said that "he [ROBINSON] had called TOM and he

wasn't there" [Tr. 48-49]. ROBINSON told Cammack to keep calling because "the stuff was real good stuff" [Tr. 10-11].

Cammack finally reached LOWE about 3:00 P.M. He told him that "JESSE [ROBINSON] had told me to call." Cammack and LOWE then made the deal. LOWE delivered the heroin to Cammack shortly afterward [Tr. 50-52].

Cammack called ROBINSON a third time on November 22nd. Cammack testified as follows:

"Q. Would you repeat that conversation as you now best recall it? A. I said, 'Hello, J. This is D. C.' He asked me how I was I doing. I said 'O.K.'"

* * * * *

After that I told him that I would like to see him and get a pint. So he told me—I asked him if he wanted me 'to do the same as I did yesterday.' So he said, 'Yes, Call Tom Lowe.' I told him 'that was real nice yesterday.' And he said, 'Yes, I know it.' So then I hung up" [Tr. 54-55].

ROBINSON's conviction on the above evidence should be sustained on at least two theories: First, that he "facilitated" the sale. Second, that he "aided, abetted, counseled, commanded, induced and procured" the sale.

The indictment charged that ROBINSON "did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 150 grains of heroin, to Delis Cammack . . ." This Court defined "facilitate" in *Pon Wing Quong v. United States*, 111 F. 2d 751, 756 (9th Cir., 1940). There, the indictment charged appellant in two separate counts with facilitating the transportation and facilitating the concealment of opium. The evidence showed that appellant was an Express Company

employee having access to the customs corral at San Francisco; that a trunk containing opium was delivered to the corral from the S. S. President Coolidge; that appellant took a sticker from a box which had passed customs inspection and placed it on the trunk, knowing that in contained opium. In holding that appellant had facilitated the transportation and concealment, the Court said:

“With the fact of importation established when the S. S. ‘President Coolidge’ crossed the three mile limit approaching San Francisco (United States v. Caminata, D. C. Pa., 1912, 194 F. 903, and Fiddelke v. United States, *supra*), the problem of facilitating the transportation after such crossing of the line is presented. After the trunk was landed in the corral it was not actually moved, except by the customs officers, and if actual movement after its arrival in the corral were the requisite for the commission of the crime of facilitating transportation after importation it could not be held to have been committed. However, here the trunk containing the opium was in the act of being transported after importation from the time it left the three mile limit until it reached its intended destination in the United States, to-wit, delivered to the consignee. Anything done to make the continuance of that trip ‘less difficult’ would constitute facilitation of its transportation. Since the term ‘facilitate’ seems not have any special legal meaning, the framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster’s Unabridged Dictionary, ‘facilitate’ is defined as follows: ‘To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.’

“The only reason for the placing of the sticker on the trunk was to permit the trunk and its contents to

pass through the customs without inspection. Certainly this act made the progress of transportation of the trunk 'less difficult' and 'freed it from difficulty or impediment' and in short facilitated transportation. The method of facilitation used was not one of actual physical movement at the moment but rather one related to the continuity of the trunk's present status of being in the course of transportation. * * *

"* * * The act of pasting the sticker upon the trunk was one which concealed the fact that the trunk contained contraband by representing that it had been inspected and was released from customs. Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment."

The only case cited by appellant, *Morei v. United States*, 127 F. 2d 827 (6th Cir., 1942), is not in point. There, the defendant Platt was charged with the purchase and sale of narcotics. He was not charged with facilitating. Here, the evidence showed that ROBINSON made the sale less difficult. He therefore facilitated the sale.

Section 2(a), Title 18, United States Code, provides that:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The Supreme Court, in *Nye & Nisson v. United States*, 336 U. S. 613, 618-619 (1949), defined "aid and abet." Said the Court:

"The trial court charged that one 'who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if

he committed it directly.' That theory is well engrained in the law. See §332 of the Criminal Code, 18 U. S. C. §550, now §2; *United States v. Johnson*, 319 U. S. 503, 518; *United States v. Dotterweich*, 320 U. S. 277, 281. In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' L. Hand, J., in *United States v. Peoni*, 100 F. 2d 401, 402."

See also :

Periera v. United States, 347 U. S. 1, 11 (1953).

An aider and abettor need not be present when the crime was committed.

Vane v. United States, 254 Fed. 32 (9th Cir., 1919);

Borgia v. United States, 78 F. 2d 550, 555 (9th Cir., 1935);

United Cigar Whelan Stores Corp. v. United States, 113 F. 2d 340, 346 (9th Cir., 1940);

Shockley v. United States, 166 F. 2d 704, 716 (9th Cir., 1948), cert. den. 334 U. S. 850 (1948).

The only case cited by appellant, *Morei v. United States*, *supra*, is not in point. There, the Court said that "the only thing Dr. Platt did was to give Beach the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing" (p. 832). Here, the facts showed that ROBINSON did more than that; he associated himself with the venture. He therefore aided, abetted, counseled, commanded, induced and procured the sale.

III.

The Court Need Not Inquire Into the Sufficiency of The Evidence Against Robinson on Count One.

The Court sentenced ROBINSON to ten years on Count One and ten years on Count Two, to run concurrently [C. Tr. 28].

Since the evidence on Count Two was sufficient to convict ROBINSON, the Court need not inquire into the sufficiency of the evidence on Count One.

Danziger v. United States, 161 F. 2d 299, 301 (9th Cir., 1947), cert. den. 332 U. S. 769;

Cohen v. United States, 201 F. 2d 386, 389 (9th Cir., 1953), cert. den. 345 U. S. 951;

Brandon v. United States, 190 F. 2d 175, 176 (9th Cir., 1951);

Lowden v. United States, 187 F. 2d 484 (9th Cir., 1951).

IV.

The Trial Court Did Not Commit Reversible Error in Limiting Cross-Examination on the Question of Credibility.

Appellants state that “the Court restricted the cross-examination of the prosecution witness [Mr. Cammack] concerning his relations with police officials and the treatment he had been getting while in the custody of the police [Reporter’s Transcript, pp. 82, 86].” (App. Br. p. 11.)

To put this statement in proper perspective the Court should look at the liberal cross-examination permitted the defense attorneys.

They were permitted to bring out:

That Cammack finished serving a County Jail sentence for using narcotics on November 19 or 20, 1957 and was immediately arrested on a Federal narcotics charge [Tr. 58-59].

That he met Malcolm Richards, a Federal narcotics agent, after his arrest on the Federal charge [Tr. 58].

That he had served time in San Quentin on a narcotics charge [Tr. 70].

That he was a narcotics addict [Tr. 58-59, 71].

That Richards or some other officer said something to him "about working for them" [Tr. 59, 72].

That Cammack said he would set up some arrests [Tr. 74].

Whether the agents promised to talk to the Probation Officer or the United States Attorney or do anything else to help him [Tr. 60].

Whether he was promised leniency if he made a case on ROBINSON [Tr. 77].

That he knew bail in Federal narcotics cases was high [Tr. 71-72].

That he knew sentences in Federal narcotics cases were lengthy [Tr. 74].

That he knew if he worked for the Government he would get out on his own recognizance [Tr. 73].

That he was released O. R. on November 20, 1957 on condition that he "cooperates and set somebody up" [Tr. 62].

That he was picked up by the Los Angeles Police Department on January 16, 1958 (apparently on the Federal

charge) and remained in custody until March 3, 1958 [Tr. 79-80, 90].

That he pleaded guilty around February 10, 1958 and was sentenced to eight years on March 3, 1958 [Tr. 58, 79, 90].

Whether the sentencing judge made any reference to reconsideration after ROBINSON's case was over [Tr. 78].

That Federal narcotics agents visited him in jail once before he was sentenced and once afterward [Tr. 66].

Whether they talked to him on the first visit about the possible sentence he could get [Tr. 66-67].

Whether anything was said about testifying against LOWE and ROBINSON [Tr. 67].

Whether they talked about his being picked up after being out O. R. [Tr. 84].

That one of the agents left him "a couple of dollars" for cigarettes [Tr. 67-68, 82-83].

Whether he was asked on the second visit if he would like to get his sentence cut [Tr. 69].

Whether he knew about the sixty-day rule for modifying sentences [Tr. 77].

That he got two more dollars [Tr. 85].

That he had conversations with the United States Attorney's Office or other members of the law enforcement agency "last Monday and Tuesday" (April 28 and 29, 1958) [Tr. 93-94].

Whether they talked about "what would happen so far as recommendation on your behalf" [Tr. 94].

Whether he told them he was no longer interested in testifying [Tr. 94].

Whether any promises were made to him at these meetings [Tr. 95].

Whether he wanted to testify [Tr. 95].

Despite the wide latitude of the cross-examination, appellants now apparently claim that the Court committed prejudicial error on two occasions in limiting inquiry into the two-dollar loans. Appellants allege the first error is contained in the following testimony, relating to the agents' visit before sentence:

“Q. You just asked him [Agent Landry] for a couple of dollars, is that right? A. That is right.

Q. He is just a friend of yours? A. Yes, he is.

Q. I see. You had been in jail before and you had borrowed money from other officers before, is that it? A. Yes, I have.

Q. This was standard procedure so far as you are concerned, is that right?

Mr. Johnson: Objection, your Honor. This is all immaterial.

The Court: I will sustain the objection.

Mr. Umann: All right” [Tr. 82].

Appellants allege the second error is contained in the following testimony, relating to the agent's visit after sentence.

“Q. You got it [the two dollars] at the gate right there in the County Jail, in the attorney room?

A. Yes.

Q. And you knew this was unusual, a special privilege, didn't you?

Mr. Johnson: Objection.

A. No, I didn't.

Mr. Umann: Oh, you didn't know that?

The Court: Yes, I will sustain the objection. Strike out the answer.

Mr. Umann: All right" [Tr. 85-86].

Appellants state:

"While it is true that the trial court ordinarily has discretion in limiting the scope of cross-examination, a different situation arises when some promises of leniency has been made to the prosecution witness and the cross-examination then goes to the special matter effecting the credibility of the witness,"

citing *District of Columbia v. Clawans*, 300 U. S. 617, 632 (1936). (App. Br. p. 11.) One look at that case shows that it does not so hold. There, the respondent was convicted in the District of Columbia police court for engaging without a license in the business of second-hand personal property, to wit, the unused portions of railway excursion tickets. The Court said:

"Although we conclude that respondent's demand for a jury trial was rightly denied, there must be a new trial because of the prejudicial restriction, by the trial judge, of cross-examination by respondent. The testimony of five prosecution witnesses was the sole evidence of the acts of respondent relied on to establish the doing of business without a license. These acts were the sale by her, on each of three occasions, to one or another of the witnesses, of the unused portion of a round trip railway passenger ticket from New York to Washington. Three of the five, a man and his wife and another, were employed by the Railroad Inspection Company as investigators. The other two were company police of the Baltimore & Ohio Railroad. All were private police or detectives, apparently acting in the course of their private employment. Common experience

teaches us that the testimony of such witnesses, especially when uncorroborated, is open to the suspicion of bias, see *Gassenheimer v. United States*, 26 App. D. C. 432, 446; *Moller v. Moller*, 115 N. Y. 466, 468; 22 N. E. 169; *People v. Loris*, 131 App. Div. 127, 130; 115 N. Y. S. 236; *Sopwith v. Sopwith*, 4 Sw. & Tr. 243, 246-7; Wigmore, Evidence (2d ed. 1923) §§949, 969, 2062, and that their cross-examination should not be curtailed summarily, see *State v. Diedtman*, 58 Mont. 13, 24; 190 Pac. 117, especially when it has a direct bearing on the substantial issues of the case.

“The defense was a suggested mistaken identity of respondent and an alibi, that at the times mentioned she was confined to her bed by illness, at her home in Newark, New Jersey. A number of questions on cross-examination by respondent were aimed at showing mistaken identity and at testing credibility. She asked one witness whether respondent had been pointed out to him. She asked another whether he had any trouble in ‘knowing’ the respondent at the trial, and whether he had seen her before the date of the alleged sale of tickets to which he testified. All these questions were excluded, as were others which were proper, since they might have established contradiction in the testimony of the witnesses for the prosecution.

“Other questions, which were relevant to the issue and obviously proper tests of credibility, were excluded. The woman witness had testified that one of the sales took place in the presence of her husband, and of the two railroad police witnesses. On cross-examination she could not remember whether anyone beside her husband was present. Yet respondent was not permitted to ask the husband whether the railroad police witnesses were known to

him or to ask one of the latter whether he knew the husband and wife before the date of the alleged sale. The court instructed one of the police officers not to answer the question whether the husband had come to Washington by prearrangement. Like questions addressed to the husband and his wife were excluded. The respondent was similarly prevented from making inquiries as to corroborative detail, such as the time of day when the witnesses arrived in Washington on the dates of the alleged sales, and the place of residence of a witness, see *Alford v. United States*, 282 U. S. 687. In the circumstances of the case, these questions may have had an important bearing on the accuracy and truthfulness of the testimony of the prosecuting witnesses. We do not stop to give other examples of the summary curtailment of all inquiry as to matters which are the appropriate subject of cross-examination.

“The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error. See *Alford v. United States*, *supra*.”

Thus, *Clawans* affirms the general rule that the extent of cross-examination rests in the sound discretion of the trial judge and only holds that summary curtailment of all

inquiry into appropriate fields is prejudicial error. Can it be said that the Court curtailed all inquiry into Cammack's relations with police officials and the treatment he received from them? The Government thinks not.

Appellants further state:

“As to this type of situation [where a promise of leniency has been made to the prosecution witness], the courts have consistently held that great latitude should be allowed in the cross-examination to test a witness's motives for testifying as bearing directly upon his credibility. *Fischer v. United States*, 237 F. 2d 99.” (App. Br. p. 11.)

The Government believes that great latitude was allowed.

Appellants also state: “It is, therefore, error to shut off a cross-examination of the prosecution's witness upon the question of any promised or expected favorable treatment,” citing *Sandroff v. United States*, 158 F. 2d 623 (6th Cir., 1946). (App. Br. p. 12.) That case is not in point. There, Charles Ginns, a Government witness, had been named as a co-conspirator, but not as a defendant, in an indictment charging violation of the Emergency Price Control Act. On cross-examination he was asked: “When were you offered immunity as to this indictment?” The Court sustained an objection. The cross-examiner immediately asked: “Were you offered immunity in this case?” The witness replied, “No.” The cross-examiner countered, “You say that notwithstanding the fact you were not named as a defendant in the indictment?” The United States Attorney objected. Defense counsel stated that he sought to find out “for what reason and under what circumstances” he had not been indicted. The Court sustained the objection. Later, in cross-examining both

Charles Ginns and Jack Ginns, who was also named as a co-conspirator but not as a defendant, the defense counsel asked whether they had paid any damages to the Government as a result of the conspiracy. Defense counsel stated he expected to show that the one year statute on a civil action by the Government for many thousands of dollars had been allowed to run. The trial court sustained objections to these questions. The Appellate Court said:

“In our judgment, the district court committed reversible error: in the first instance, in shutting off the cross-examination of Charles Ginns upon the question of promised or expected immunity; and, later, in refusing to permit his cross-examination upon the tendered subject matter pertaining to why he and his son, Jack Ginns, who, though named as coconspirators *in pari delicto* with Sandroff, had not been included as defendants in the indictment. The two Ginns were the chief and indispensable Government witnesses in the prosecution of Sandroff and his company. In such circumstances, it was highly important that latitude be allowed in cross-examination to test their motives for testifying against Sandroff as bearing directly upon their credibility. The district court emphasized its error by declaring in the presence of the jury that it was incompetent, irrelevant and wholly foreign to the issues in the case to show why Charles Ginns had not been included as a defendant in the indictment.

“The decision and opinion of this court in *Farkas v. United States*, 6 Cir., 2 F. 2d 644, 647, is directly in point, and clearly indicates that the judgment below must be reversed and the case remanded for retrial. The necessity for this course is apparent from the following quotation from the opinion: ‘The prosecuting witnesses, before the time of the trial, had pleaded

guilty to an indictment in the federal court; the verdict of guilt or innocence in the instant case depended primarily upon their credibility as against that of defendant who testified in denial of the demands and threats. *As bearing upon their credibility, motive for false accusations, as well as bias, was vitally relevant, and testimony tending to show such motive was entirely competent. Concedely promises of immunity are admissible; they are, however, rarely made.* Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope.* The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.

“The trial judge, although at one time during the taking of testimony he had so ruled, later sustained the objection to similar testimony, and finally not only refused an instruction that the jury might consider the fact of the delayed sentence as bearing on such hope, but expressly instructed counsel that they must not argue the matter as affecting the motives of the witnesses.

“*In our judgment, this was such error as to compel a reversal in the instant case. Stevens v. People,*

215 Ill. [593,] 601, 74 N. E. 786; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.' [Italics supplied.]

"In *Alford v. United States*, 282 U. S. 687, 692, 693, 694, 51 S. Ct. 218, 219, 75 L. Ed. 624, the Supreme Court held that the defense had the right to show by cross-examination that the testimony of a prosecuting witness was affected by fear, or favor growing out of his detention, and that it was immaterial whether he was in custody because of his participation in the transactions for which the defendant was indicted or for some other offense. The ruling of the trial court, cutting off *in limine* all inquiry as to whether his testimony was biased 'because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution,' was held to be an abuse of discretion and to constitute prejudicial and reversible error. *Farkas v. United States*, *supra*, was cited three times in the opinion in the *Alford* case. Mr. Justice Stone (afterwards Chief Justice) pointed out that it is the essence of a fair trial that reasonable latitude be given a cross-examiner, and asserted: 'To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.' *Cf.* *Moyer v. United States*, 9 Cir., 78 F. 2d 624, 630. See *King v. United States*, 5 Cir., 112 F. 988, 995, 996, for discussion of the wide latitude permitted in the cross-examination of witnesses in criminal cases. The authorities cited by Government counsel are not considered to be in conflict with the reasoning in the authorities which impel us to reverse and remand this

case. *Ramsey v. United States*, 6 Cir., 268 F. 825; *Beach v. United States*, 80 U. S. App. D. C. 160, 149 F. 2d 837; *Safford v. United States*, 2 Cir., 252 F. 471; *Barron v. United States*, 1 Cir., 5 F. 2d 799, 804" (pp. 629-630).

Hence, *Sandroff* is another case where there was summary curtailment of all inquiry into promised or expected immunity.

Here, appellants were permitted to go into that subject in great detail. There was no error.

Appellants then say that: "The defense has more than a privilege of cross-examination, it has a *right* to show that the testimony of a prosecution witness was affected by fear or favor growing out of his detention," citing *Alford v. United States*, 282 U. S. 687 (1931). (App. Br. p. 12.) That case was discussed in *Sandroff*, *supra*. Suffice to say again, that *Alford* was a case where all inquiry in "identifying the witness with his environment" and all inquiry into custody by Federal authorities was excluded. Nothing of that sort occurred here.

Finally, appellants argue that: "It is only after the right of cross-examination has been" thoroughly and substantially "exercised that the allowance of further cross-examination becomes discretionary with the Court." (App. Br. p. 12.) Appellants cite *Touhy v. United States*, 88 F. 2d 930 (8th Cir., 1937). The Court there said:

"We find no error in the refusal of the court to allow Epmeier, who had 'turned State's evidence,' to answer on cross-examination, 'what his (the witness') purpose was in testifying for the government.' It is plain that the question was unhappily framed and that technically it called for a conclusion; yet we think the refusal by the court to allow it to be an-

swered would have been error, but for the fact that this witness had already been cross-examined at great and excessive length as to what promises of benefit or immunity if any, had been made to him for pleading guilty and testifying for the government, and he had already said that while no such promises had been made, he 'hoped, but did not expect,' the court would take the matter of his testifying for the government into favorable consideration. We think in this situation the point made is ruled by what this court said in the case of *Hartzell v. United States* (C. C. A.) 72 F. (2d) 569, 585, thus: 'A defendant is entitled as a matter of right to have an opportunity of fairly and fully cross-examining the witnesses appearing against him. A denial of this right is usually prejudicial error. It is only after the right of cross-examination has been substantially and thoroughly exercised that the allowance of further cross-examination becomes discretionary with the trial court. *Heard v. United States* (C. C. A. 8) 255 F. 829; *Cossack v. United States* (C. C. A. 10) 57 F. (2d) 506; *Galindez v. United States* (C. C. A. 1) 19 F. (2d) 352.'

"A similar contention is urged, that the trial court unduly curtailed and restricted the cross-examination of the witness Barry, a participant in the crimes charged, and who likewise testified for the government. In addition to his cross-examination exhaustively as to promisee of lenity or immunity, Barry was asked as to an alleged conversation he had had with two post office inspectors, whether 'there was any discussion of any other case under which you (the witness) might be indicted by the United States'? To this question an objection by the government was sustained, and this is urged as error. What has been said already largely applies to this contention. Be-

sides, no offer of proof was made by appellant, so we do not know whether if the witness had been permitted to answer, such answer would have been of any help to appellant [*Flowers v. United States* (C.C.A.) 83 F. (2d) 78, 81]; nor can we take judicial notice that a post office inspector has any authority by law either to mete out punishment, or to grant immunity to criminals” (p. 934).

The Government stands four-square on the law in *Touhy*. However, the Government thinks that the facts in the instant case show that the right of cross-examination was “substantially and thoroughly” exercised. Thus, there was no error.

Appellants make one last statement based on *Farkas v. United States*, 2 F. 2d 644 (6th Cir., 1924). (App. Br. p. 12.) The relevant part of that opinion was set forth in *Sandroff*, *supra*. It is not in point for the same reason that *Sandroff* was not in point, namely, because there the appellant was not permitted to go into promised or expected immunity. Here they were.

V.

The Court Did Not Err in Admitting Rebuttal Evidence.

The important facts on this point are as follows:

On direct examination it was pointed out that ROBINSON had told Cammack at ROBINSON’s house that “the reason he didn’t say much on the telephone [was] because a friend of his had been convicted through a telephone conversation” [Tr. 47].

During the cross-examination of ROBINSON it was brought out that, although he knew Smokey Shannon, he did not mention the name to Cammack [Tr. 120].

The Government then recalled Cammack who testified that he had a conversation with ROBINSON about Smokey. He said ROBINSON told him "that was the reason he had me to come over to his house, because Smokey had been convicted through a telephone conversation, that he hadn't accepted any money or gave any money on narcotics" [Tr. 129].

The scope of rebuttal evidence is set forth in Wigmore on Evidence, Section 1873 (3rd Ed. 1940):

"It is clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to *meet the new facts* put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered. To discriminate between the first of these classes and the opponent's testimony merely denying the same facts that the proponent's witness had originally affirmed, is no doubt often difficult, and it is then not easy to say whether the proponent's testimony in rebuttal might or might not as well have been put in originally; yet the principle involved is clear. Moreover, practical disadvantages that would result from abandoning the natural order of evidence are, first, the possible unfairness of an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alteration of successive fragments of each case which could have been put in at once in the beginning.

“Accordingly, it is well settled that, while the occasional difficulty of discrimination, and the frequency of inadvertent omissions and unexpected contests, add emphasis to the general principle of the trial Court’s discretion (*ante*, § 1867), yet the usual rule will exclude *all evidence which has not been made necessary by the opponent’s case in reply*:

“In applying this customary rule of order, however, certain distinctions must be noted:

* * * * *

“(2) . . . the evidence offered thus tardily may consist either in *new facts* which ought to have been put in before, or in a repetition (either by a new witness or by the same former witness) of *former facts already once evidenced*. The customary rule will equally forbid both. But, on the other hand, the principle of the trial Court’s discretion will equally sanction either; though the reasons in a given instance for thus permitting a departure would differ in the two cases, since for the former an inadvertent omission might be a sufficient excuse, while for the latter a just cause would be found in the need of clearing up an obscurity or emphasizing a disputed point upon which substantial contest had not been anticipated; moreover, the danger of unfair surprise might be present in the former case, but could hardly exist in the latter case.

* * * * *

“(4) *For matters properly not evidential until the rebuttal*, the proponent has a *right* to put them in at that time, and they are therefore not subject to the discretionary exclusion of the trial Court. Matters that should have been put in at first may by that discretion be refused later, because this is but the denial of a second opportunity. But matters of true

rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission. Hence, while the trial Court's determination of what is properly rebutting evidence should be respected, yet, if its nature as such is clear, the proponent does not need the trial Court's express consent to admit it as involving a departure from the customary rule.

"This will always be the case for evidence offered to impeach the opponent's witnesses by way of moral character, bias, self-contradiction, or the like."

The Government's position is that the Court properly admitted Cammack's rebuttal testimony under two theories: (1) that it was proper exercise of the court's discretion in permitting evidence of former facts already once evidenced; and (2) that it was offered to impeach ROBINSON.

There is, of course, one other hurdle in connection with the impeachment theory: a witness cannot be impeached on a collateral matter. What is the test of collateralness? Let us turn to 3 Wigmore on Evidence, Section 1003 (3rd Ed. 1940):

"The common term for designating the line of exclusion is 'collateral'; *no contradiction*, we are told, *shall be permitted on 'collateral' matters*.

"But this term furnishes no real test. If it be asked what 'collateral' means, we are obliged either to define it further—in which case it is a mere epithet, not a legal test—or to illustrate by specific examples—in which case we are left to the idiosyncrasies of individual opinion upon each instance.

"The test that it dictated by the principle above explained, and the only test in vogue that has the qualities of a true test—definiteness, concreteness, and

ease of application—is that laid down in *Attorney-General v. Hitchcock*:* *Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?"*

This Circuit follows the Hitchcock rule.

Shanahan v. Southern Pac. Co., 188 F. 2d 564, 568 (9th Cir., 1951);

Hersog v. United States, 226 F. 2d 561, 565 (9th Cir., 1955);

Smallfield v. Home Insurance Company of New York, 244 F. 2d 337, 341 (9th Cir., 1957);

Cf. 3 Wigmore on Evidence Sec. 1003, fn. 3 (3rd Ed. 1940).

Using that rule, the rebuttal evidence was clearly admissible because it was matter which the prosecution could and did—without objection—prove as part of the Government's case. Also, it was a matter which was otherwise admissible on cross-examination and was admitted—without objection—to show a specific deficiency of the witness. See *3 Wigmore on Evidence*, Sec. 1020 (3rd Ed. 1940).

VI.

A General Objection, if Overruled, Cannot Be Availed of on Appeal.

This principle is well established. Appellant's objection to the rebuttal evidence falls within the rule.

Noonan v. United States, 121 U. S. 393, 400 (1887);

District of Columbia v. Woodbury, 136 U. S. 450, 462 (1890);

*1 Exch. 99.

Olender v. United States, 237 F. 2d 859, 866 (9th Cir., 1956, *cert. den.* 352 U. S. 982 (1957);
Bank of Italy v. F. Romeo & Co., 287 Fed. 5, 9 (9th Cir., 1923).

VII.

Any Errors Should Be Disregarded.

If any errors were made they did not affect substantial rights and should be disregarded.

F. R. C. P. 52(a).

Conclusions.

1. The evidence was sufficient to convict ROBINSON on Count Two.
2. The Court need not inquire into the sufficiency of the evidence on Count One.
3. The trial Court did not commit reversible error in limiting cross-examination on the question of credibility.
4. The trial Court did not err in admitting rebuttal evidence.
5. If there were any errors they did not affect substantial rights and should be disregarded.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

*Assistant U. S. Attorney,
Chief, Criminal Division,*

ROBERT D. HORNBAKER,

*Assistant U. S. Attorney,
Attorneys for Appellee.*

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Respondent.



No. 16183

United States
Court of Appeals
for the Ninth Circuit

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

GEORGE OLSHAUSEN,
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San Francisco, California,
Attorney for Petitioner.

CHARLES K. RICE,
Assistant U. S. Attorney General,

LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.,
Attorneys for Respondent.



The Tax Court of the United States

Docket No. 61127

GEORGE OLSHAUSEN, Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency Ap:SF:AA:LT 90-D:RSG dated December 12, 1955, and as a basis for his proceeding alleges as follows:

1. The petitioner is an individual with residence at 1238 Pacific Avenue, San Francisco 9, California. The returns for the period here involved were filed with the Collector for the District of San Francisco, California.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to petitioner on December 12, 1955.

3. The deficiencies (or liabilities) as determined by the Commissioner, are in claimed penalties for the calendar years 1952 and 1953, in the amount of \$1,416.02, of which the entire amount is in dispute.

4. The determination of penalty set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in finding that no reasonable cause has been shown for failure to file estimated tax returns for the years 1952 or 1953;

(b) The Commissioner erred in holding that he can assess penalties for alleged substantial underestimation, which was in fact, failure to file estimated tax returns, as set forth in (a) above, and which failure to file was brought about by the acts and delay of the Commissioner of Internal Revenue himself; and erred in failing to hold that assessment of penalties under such circumstances and for such reasons is taking property without due process of law in violation of the Fifth Amendment to the United States Constitution;

(c) The Commissioner of Internal Revenue erred in holding that where no estimated tax return has been filed, the penalty for "substantial overestimation" is cumulative to the penalty for failure to file, or can exist independently of the latter (i.e., where good cause has been shown) and further erred in failing to hold that the Internal Revenue Bureau regulation allowing such cumulation (Supplement to Regulations 111, sec. 29, 294-1(b)(3)(A), p. 438) is invalid as inconsistent with the language of 26 USCA 294, as it existed previous to 1954.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

When estimated tax returns were first introduced in 1943, petitioner understood the law to be that an estimated tax return had to be filed under all

circumstances, and filed same. The following year (1944) petitioner understood that the law had again been changed to make it optional whether to file estimated tax returns and pay thereon or to file Form 1040 and pay thereon. From and including 1944 to and including 1953 petitioner filed only Form 1040 each year. Each of these returns showed on its face that no payment of estimated tax had been made. The penalties now claimed are for the ninth and tenth years of this ten-year period (1944-1953). The Commissioner of Internal Revenue never made any objection to the filing and payment of tax on Form 1040 alone, and to the nonfiling of estimated tax returns. Objections to or revision of petitioner's tax returns during this period were, however, made in other respects, as set forth in Exhibit "B" hereto attached.

In the year 1946 petitioner's return included a fee apportioned back over a ten-year period; no claim was made that any estimated tax returns should have been filed.

In the year 1950 petitioner's return included a fee apportioned back over a four-year period; no claim was made that any estimated tax returns should have been filed.

After assessment of claimed penalties by the Internal Revenue Agent, petitioner filed a timely protest. A full, true and correct copy of said protest is hereto attached and marked Exhibit "B", and incorporated in this petition and made a part thereof. There has been added to the text of said

protest the correct citation of *Delaney vs. U. S.*, 199 F. 2d 107, and the citation of *Jones vs. U. S.*, 226 F. 2d 24.

Thereafter, on or about November 7, 1955, petitioner had a conference with R. S. Gilmore, Technical Advisor of the Appellate Division, San Francisco Region. Salient features of said conference are set forth in Exhibit "C" attached hereto and made a part of this petition as fully as if set forth herein.

Wherefore, petitioner prays that this Court may hear the proceedings and set aside the claimed deficiency in toto.

Respectfully submitted,

/s/ GEORGE OLSHAUSEN,

In propria persona.

Duly Verified.

EXHIBIT "A"

STATEMENT

Ap:SF:AA:LT 90-D:RSG
Mr. George G. Olshausen
1238 Pacific Sreet
San Francisco, California

Tax Liability for the Taxable Years Ended December 31, 1952,
and December 31, 1953

Year	Section 294(d) (1) (A)	Additions to Tax	
		Section 294 (d) (2)	
1952 Income Tax Penalties	\$734.87	\$489.92	
1953 Income Tax Penalties	114.73	76.50	
	<hr/>	<hr/>	
Total	\$849.60	\$566.42	

Exhibit "A"—(Continued)

You did not file Declarations of Estimated Tax, nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by Section 294(d)(1)(A) and Section 294(d)(2), Internal Revenue Code (1939), for the taxable years 1952 and 1953.

In making this determination of your income tax liability, careful consideration has been given to your protest dated October 6, 1955.

Year: 1952

Adjustments to Income

Net income as shown on the return—unchanged..... \$11,277.05

Computation of Income Tax

Tax liability as shown on the return Account No.

AP 5210, San Francisco District—unchanged..... \$ 8,165.26

Deficiency (Overassessment) in income tax..... None

Computation of Addition to Tax for Substantial Underestimation
of Declaration of Estimated Tax Under Section 294(d)(2)
of the Internal Revenue Code

(a) Corrected Tax \$ 8,165.26

80% of Above (66-2/3 if farmer)..... 6,532.21

Less: Withholding Tax Actually Withheld.....None

Estimated TaxNone —0—

Tentative Addition to Tax..... \$ 6,532.21

(b) Corrected Tax \$ 8,165.26

Less: Withholding Tax Actually Withheld.....None

Estimated TaxNone —0—

Difference \$ 8,165.26

Tentative Addition to Tax (6% of above balance) \$ 489.92

Addition to Tax:

Tentative (a) or (b), whichever is the lesser..... \$ 489.92

Failure to File a Declaration of Estimated Tax on Time
Section 294(d)(1)(A)

Corrected Tax \$ 8,165.26

Less: Withholding Tax Actually Withheld.....None

Overpayment credit, if any, from a prior

yearNone —0—

Balance to be divided into 4 installments due \$ 8,165.26

Exhibit "A"—(Continued)

Year: 1952—(Continued)

Amount Due	Installment Due Date	Date Paid	1% for Each		
			Addition for First Month Unpaid	Additional Month or Fraction	Not More Than 10% Assessable
\$ 2,041.31	3-15-52	3-15-53	5%	5%	\$ 204.13
2,041.31	6-15-52	3-15-53	5%	5%	204.13
2,041.32	9-15-52	3-15-53	5%	5%	204.13
2,041.32	1-15-53	3-15-53	5%	1%	122.48
<hr/>			Addition to Tax		<hr/>
\$ 8,165.26					\$ 734.87

Year: 1953

Adjustments to Income

Net income as shown on the return—unchanged..... \$ 5,768.76

Computation of Income Tax

Tax liability as shown on the return Account No.

OP 35226, San Francisco District—unchanged..... \$ 1,274.94

Deficiency (Overassessment) in income tax..... None

Computation of Addition to Tax for Substantial Underestimation
of Declaration of Estimated Tax Under Section 294(d) (2)
of the Internal Revenue Code

(a) Corrected Tax \$ 1,274.94
 80% of Above (66-2/3% if farmer)..... \$ 1,019.95
 Less: Withholding Tax Actually Withheld....None
 Less: Estimated TaxNone —0—

Tentative Addition to Tax..... \$ 1,019.95

(b) Corrected Tax \$ 1,274.94
 Less: Withholding Tax Actually Withheld....None
 Less: Estimated TaxNone —0—

Difference \$ 1,274.94

Tentative Addition to Tax (6% of above balance) \$ 76.50

Addition to Tax:

Tentative (a) or (b), whichever is the lesser... \$ 76.50

Failure to File a Declaration of Estimated Tax on Time
Section 294(d) (1) (A)

Corrected Tax \$ 1,274.94

Exhibit "A"—(Continued)

Year: 1953—(Continued)

Less: Withholding Tax Actually Withheld.....None
 Less: Overpayment credit, if any, from a prior
 yearNone —0—
 Balance to be divided into 4 installments due \$ 1,274.94

		1% for Each			
		Addition for Additional Not More			
Amount Due	Installment Due Date	Date Paid	First Month Unpaid	Month or Fraction	Than 10% Assessable
\$ 318.73	3-15-53	3-15-54	5%	5%	\$ 31.87
318.73	6-15-53	3-15-54	5%	5%	31.87
318.74	9-15-53	3-15-54	5%	5%	31.87
318.74	1-15-54	3-15-54	5%	1%	19.12
<hr/>		<hr/>			
\$ 1,274.94		Addition to Tax \$ 114.73			

Served February 28, 1956.

[Endorsed]: T.C.U.S. Filed February 24, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegation contained in paragraph 1 of the petition.
2. Admits the allegation contained in paragraph 2 of the petition.
3. Admits the allegation contained in paragraph 3 of the petition.

4. (a) to (c), inclusive. Denies the Commissioner erred as alleged in sub-paragraphs (a) to (c), inclusive, of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue
Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service, Room 1067, 870 Market Street, San Francisco, California.

Served April 12, 1956.

[Endorsed]: T.C.U.S. Filed April 11, 1956.

EXHIBIT "A"

[Title of Tax Court and Cause.]

PROPOSED AMENDMENT TO PETITION

The determination of penalty set forth in the Notice of Deficiency is based upon the following errors in addition to those set forth in subdivision 4, pages 2 and 3 of the original Petition:

(d) The Commissioner of Internal Revenue erred in holding that there was a failure to pay installments of estimated tax declared or undeclared; and in failing to find the contrary;

(e) The Commissioner of Internal Revenue erred in failing to find that the notice of the requirement of filing both Form 1040 and the Estimated Tax Return, given by the Instructions Pamphlet was inadequate and known to be inadequate to the District Director of the San Francisco District and to the Commissioner of Internal Revenue;

(f) The Commissioner of Internal Revenue erred in failing to find that the notice of requirement of filing both Form 1040 and the Estimated Tax Return was inadequate even after the Instructions Pamphlet had been supplemented by a newspaper advertisement.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed December 13, 1956.

[Title of Tax Court and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, and for answer to the amendment to the petition filed on December 13, 1956, by the above-named petitioner, denies as follows:

4. (d) to (f), inclusive. Denies the Commissioner erred as alleged in paragraphs (d) to (f), inclusive, of the amendment to subdivision 4 of the original petition.

Wherefore, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES, CWN,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney.

Served and Entered January 7, 1957.

[Endorsed]: T.C.U.S. Filed January 4, 1957.

EXHIBIT "B"

[Title of Tax Court and Cause.]

PROPOSED SECOND AMENDMENT
TO PETITION

The determination of penalty set forth in the notice of Deficiency is based upon the following error in addition to those set forth in the original petition and in the subsequent amendment thereto:

(g) The Commissioner of Internal Revenue erred in failing to find that he was barred by laches from levying or collecting the penalties or any of them

set forth in the deficiency notice attached as Exhibit "A" to the original petition.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Duly Verified.

Served and Entered May 10, 1957.

[Endorsed]: T.C.U.S. Filed May 8, 1957.

[Title of Tax Court and Cause.]

ANSWER TO SECOND AMENDMENT
TO PETITION

The Respondent, in answer to the proposed second amendment to the petition filed in the above-entitled case, denies as follows:

(g) Denies the Commissioner erred as alleged in the unnumbered first paragraph of the petition as amended, and in subparagraph (g) thereunder.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service.

Served and Entered June 7, 1957.

[Endorsed]: T.C.U.S. Filed June 3, 1957.

EXHIBIT "A"

[Title of Tax Court and Cause.]

PROPOSED THIRD AMENDMENT
TO PETITION

The determination of penalty set forth in the notice of deficiency is based upon the following errors in addition to those set forth in the original petition and in the subsequent amendments thereto:

(h) The Commissioner of Internal Revenue erred in issuing a deficiency notice at all, and erred in holding that the present case falls within the deficiency notice procedure;

(i) The Commissioner of Internal Revenue erred in failing to hold that a deficiency notice in the present case violates petitioner's constitutional rights in each of the following respects:

First: It denies the right of trial by jury in violation of the VIth Amendment to the United States Constitution, where the amounts claimed are criminal penalties, and in violation of the VIIth Amendment to the United States Constitution where the amounts claimed are civil penalties or interest;

Second: The deficiency notice, being an executive determination of liability on the ground of alleged fault, is a denial of due process of law in violation of the Vth Amendment to the United States Constitution, and in effect a bill of attainder (an "executive bill of attainder") in violation of Art. I,

Exhibit "A"—Continued

sec. 9, cl. 3, of the United States Constitution so far as the amounts claimed are criminal penalties.

Third: The inverted burden of proof, provided by Tax Court Rule No. 32 is a denial of due process of law in violation of the Vth Amendment to the United States Constitution, under the rule of cases like *W & A Ry. v. Henderson*, 279 US 639, and *Tot v. U.S.*, 319 U.S. 463.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Served and Entered July 23, 1957.

[Endorsed]: T.C.U.S. Filed June 22, 1957.

[Title of Tax Court and Cause.]

ANSWER TO THIRD AMENDMENT
TO PETITION

The Respondent, in answer to the proposed third amendment to the petition filed in the above-entitled case, denies as follows:

(h) Denies the allegations of error contained in paragraph (h) of the proposed third amendment to petition.

(i) First, Second, and Third. Denies the allegations of error contained in subparagraphs First through Third of paragraph (i) of the proposed third amendment to petition.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ NELSON P. ROSE,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, Leslie T. Jones, Jr., Attorney, Internal Revenue Service.

Served and Entered August 8, 1957.

[Endorsed]: T.C.U.S. Filed August 6, 1957.

[Title of Tax Court and Cause.]

CONDITIONAL DEMAND FOR JURY TRIAL

In the event that the defense in the Third Amendment to Petition is not sustained, Petitioner hereby demands a jury on the trial of the above entitled action upon all issues other than said Third Amendment.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Served and Entered August 29, 1957.

[Endorsed]: T.C.U.S. Filed August 26, 1957.

[Title of Tax Court and Cause.]

STIPULATION AS TO FACTS

It is stipulated that the following facts may be received in evidence without further proof: pro-

vided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated: and provided, further, that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. Petitioner is an individual, residing in San Francisco, California, who has at all times herein mentioned filed individual income tax returns at the San Francisco, California office of the Commissioner of Internal Revenue;

2. Petitioner has at all times personally prepared his own income tax returns, without assistance;

3. From and including 1944 to and including 1953 petitioner filed only Form 1040 each year;

4. Each of these returns showed on its face that no payment of estimated tax had been made;

5. In the year 1946 petitioner's return included a fee apportioned back over a ten-year period. Petitioner did not declare and file estimated income tax returns for said year nor did the Commissioner of Internal Revenue object to this procedure;

6. In the year 1950 petitioner's return included a fee apportioned back over a four-year period. Petitioner did not declare and file estimated income tax returns for said year nor did the Commissioner of Internal Revenue object to this procedure;

7. All forms 1040 for past years, and all instruc-

tion pamphlets accompanying Form 1040 for past years are to be admitted in evidence without objection of respondent;

8. Letter of April 12, 1957, from U. S. Treasury Department to George Olshausen, signed by K. W. Johnson is to be admitted in evidence without objection of respondent;

9. At all times herein mentioned James Fung was and is an internal revenue agent; Ross R. Barkley was and is a group chief of Internal Revenue service; Robert S. Gilmore was and is a technical advisor of Internal Revenue service.

/s/ GEORGE OLSHAUSEN,
Petitioner.

/s/ NELSON P. ROSE,
Attorney, Internal Revenue Service, Chief Counsel,
Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed October 3, 1957.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Customs Courtroom 421, U. S. Appraisers Building, 630 Sansome Street, San Francisco, California.
Thursday, October 3, 1957.

(Met, pursuant to call of the calendar, at
2:00 o'clock p.m.)

Before: Honorable Clarence P. Le Mire, Judge.

Appearances: George Olshausen, 1238 Pacific

Avenue, San Francisco, California, appearing for the Petitioner. Leslie Jones and T. M. Mather, (Honorable Nelson P. Rose, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1]*

Proceedings

The Court: You may call the case, Mr. Clerk.

The Clerk: Docket 61127, George Olshausen.

State your appearances.

Mr. Jones: Leslie Jones and T. M. Mather for the Respondent.

Mr. Olshausen: And the Petitioner appears in propria persona. I am both the Petitioner and the Attorney of record.

The Court: Very well, sir.

Mr. Olshausen: I will first make an opening statement in this matter.

The Court: Before we start, I have looked through these files. I don't see the 90-day letter and computations attached. If you can find it in this file, I wish you would.

Mr. Olshausen: A copy was attached to the petition.

The Court: Oh, I see. Well, I didn't find any date on that.

Mr. Jones: The first page, I don't think was—I will take a look.

The Court: There doesn't appear to be any date on it.

* Page numbers appearing at top of page of Reporter's Transcript of Proceedings.

Mr. Jones: December 12, 1955, your Honor. [2]

The Court: Is that omitted on this copy? Where should that appear on this copy that is here. This should be an extra copy.

Do you have the 90-day letter in your file?

Mr. Olshausen: Yes, I think I have the original in here.

The Court: If you don't mind, I would prefer that you would introduce in evidence that 90-day letter.

Mr. Olshausen: The original 90-day letter?

The Court: Yes.

Mr. Olshausen: I will have to go through this file to find it. It is not one of the papers I had on top to introduce in evidence, but I can go through the file during the recess or whenever it is convenient to the Court. I do have the original 90-day letter here.

The Court: Well, you don't mind introducing it in evidence, do you?

Mr. Olshausen: No, no.

The Court: Very well. If you locate that after the hearing, you can put it in as your Exhibit No. 1. I suppose we would have to call it Exhibit No. 1.

Mr. Olshausen: That's all right.

The Court: Is that satisfactory to you gentlemen?

Mr. Jones: Yes. [3]

The Court: The 90-day letter with computation attached——

Mr. Olshausen: Yes.

The Court: ——will be offered as Petitioner's Exhibit 1.

Mr. Olshausen: Yes.

The Court: And you will hand that to the Clerk?

Mr. Olshausen: Yes. I think at present a copy of the 90-day letter is attached to the petition, and for practical information it is before the Court that way; and, at least, the computation is, and that's one of the legal issues in this case.

(Petitioner's Exhibit No. 1 was marked for identification and received in evidence.)

Opening Statement on Behalf of the Petitioner

Mr. Olshausen: As I say, I will make this opening statement to outline what the issues are.

This case is one that does not involve a tax deficiency. It deals solely with what the statute calls additions to the tax in Section 194 of the 1939 Revenue Act; namely, what was the 60—Section 294 in the Section, internal revenue, of the 1939 Code.

The 90-day letter and the computation calls it a penalty. Now, the correct term for that is something that may or may not come up in the course of the hearing. I just [4] want to say the position that we will develop will be the same whether it is called a penalty or something else.

The Court: Very well.

Mr. Olshausen: Our first point is that inasmuch as there is no claim for any tax deficiency, the procedure by a deficiency notice and the 90-day letter does not apply and that it applies neither under the terms of the 1939 Act nor, as far as this goes, which would be considered a procedural matter under the terms of the 1954 Act.

In other words, the first objection is that the government is mistaken in its remedy. What its remedy is I am not here to say, but it will presumably be an action in the District Court, and before even approaching the issues of the fact, our position is that judgment must go for the Petitioner on the grounds of the insufficiency of facts alleged in the deficiency notice; that, as I say, the deficiency is not competent under the statute to fix liability in the absence of a claim of deficiency in the tax itself.

Secondly, as a corollary, or as a complement to that contention, is the contention that if the statutes were construed to apply to a situation like this where it deals solely with the so-called penalties, it would raise serious constitutional questions.

It would raise, first of all, the question of the denial of the right to jury trial and, second, it would raise [5] the probable unconstitutionality of Rule 32, inverting the burden of proof.

In other words, that as applied to the claim for penalty or for any money claimed solely on the basis of alleged fault, the inverted burden of proof of Rule 32 is unconstitutional.

Now, the facts on which this lie is that for the 10-year period from 1944 or, at the latest, 1945, to 1953 inclusive, the payments were made of taxes and admittedly made in full throughout, but solely on the Forms 1040 and without the filing of any estimated tax returns; and the penalties claimed are for the failure to file the estimated tax returns and for what amount of a cumulative penalty of supposed under-estimation, which is merely a re-

statement of the objection of the failure to file the cumulative tax return.

During that 10-year period the Commissioner never made any objection to the procedure that was followed and, in fact, never made any objection until 1955. Although other objections were made to the returns that were filed, billings were made for amounts claimed to be due in addition to the taxes which were shown; or, in one case, a refund was made. And the errors which the Commissioner made during that period were errors on the side of overzealousness. In other words, billing for taxes already [6] paid; and that has also continued since the date of 1955, and that on the basis of those facts and other similar facts which we will develop more in detail, the first position is that there was reasonable cause for the non-filing of the deficiency notices.

And it should be remembered that the two years which are in issue here are the years 1952 and 1953. In other words, they are the years following the end of the 10-year period, not the years following at the beginning of the 10-year period.

In addition to that, there is the legal point, first, that if reasonable cause appears for the non-filing, there is no separate penalty for wilful underestimation and, furthermore, we take the position that there is no cumulative penalty for wilful underestimation in any sense.

There are some Tax Court cases which hold that the penalty is cumulative, but the matter has never

gone to a court of appeals, and we make that point for the record in order to preserve the record.

Do you want to make an opening statement now?

Mr. Jones: Yes.

Opening Statement on Behalf of Respondent

Mr. Jones: Your Honor, this case involves the years 1952 and 1953 and, as indicated, deals with penalties under Section 294 (d). [7]

The taxpayer is a lawyer, and during both years earned income from the legal business which was not subject to withholding. It is not in dispute that Petitioner did not file or declare or pay estimated income tax in either of these years. Consequently, the only question is whether he had reasonable cause for failing to do so.

Petitioner adopted the theory that he was under the impression that the law changed in 1944. In view of the various decisions of this Court that a misunderstanding or ignorance of the law does not constitute reasonable cause, the Commissioner has imposed penalties under 294 (a)(1) as well as 294 (d)(2).

In so far as Petitioner questions the jurisdiction of this Court, the answer to that would seem to be that he filed the petition.

Thank you.

Mr. Olshausen: I would like to make, so that the issues will be clear, two corrections.

In the first place, it is not conceded that there was a nonpayment of the estimated tax since there was a non-filing. That much is conceded, but since

the taxes were paid in full, it is not conceded that there was a nonpayment.

In the second place, there is no objection to the jurisdiction of this Court. I don't know whether I should [8] elucidate this point now or later on in the argument. The point is not that this Court has no jurisdiction, but that this Court—the proper decision by this Court in the exercise of its jurisdiction is analagous to that of sustaining a demurrer to a pleading in this case, the pleading although filed before the case gets in this court, the notice being the deficiency notice itself, the point is not that this Court has no jurisdiction but that a deficiency notice states insufficient facts on which to crystallize the liability.

First I will call Mr. Gilmore, who is in court now.

The Court: Very well.

You may come around, sir.

Whereupon,

ROBERT S. GILMORE

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Will you state your name and address for the record, please?

The Witness: Robert S. Gilmore, San Mateo, California.

Direct Examination

Q. (By Mr. Olshausen): Mr. Gilmore, your occupation is a technical advisor to the Department of Internal Revenue? [9]

(Testimony of Robert S. Gilmore.)

A. That's correct.

Q. And how long have you held that position?

A. Since 1949.

Q. And have you been in San Francisco, in the San Francisco Office, during the entire time?

A. Yes.

Q. Now, is it a fact that the—I will withdraw that for the moment.

Were you employed by the Internal Revenue Service before 1949? A. Yes, sir.

Q. And for how long before that?

A. Eight years.

Q. And where had you been employed before you came to San Francisco?

A. I was employed in Montana.

Q. So you have been continuously employed by the United States Department of Internal Revenue since 1941; is that correct? A. That's correct.

Q. Now, is it a fact that the Department of Internal Revenue first began imposing penalties for the non-filing of estimated tax returns on individual income in the year 1950?

A. Not to my knowledge. [10]

Q. Now, what do you mean by that answer, that they did not begin to impose penalties, then, or that they had begun to impose penalties before that?

Mr. Mather: If your Honor please, I will object to that question. This witness hasn't qualified what the internal policy of the Internal Revenue Service was. He has testified that he was located in Montana and in San Francisco. I have no objection to his

(Testimony of Robert S. Gilmore.)

testifying to what he did, but what the policy of the Internal Revenue Service was with respect to national policy, I don't think he has been qualified.

Mr. Olshausen: Well, so far as he knows, of course.

The Court: You may ask him whether or not he knows.

Q. (By Mr. Olshausen): Do you know when the Department of Internal Revenue began to collect penalties for the non-filing of estimated tax returns on individual income taxes? A. No, I do not.

Q. You do not? A. No.

Q. Do you remember that you had a conference with me on the 7th of November 1955?

A. That's correct. [11]

Q. And didn't you tell me then that the Department did not begin to collect penalties for non-filing of estimated tax returns until the year 1950?

A. No, I did not tell you that.

Q. You did not tell me that then?

A. No.

Q. Did the San Francisco Office ever publish an ad in any newspaper stating that from the date on after it was published both estimated and tax returns and forms 1040 would have to be filed?

A. Not to my knowledge.

Q. Did the office ever give a press release to that effect? A. Which office?

Q. The San Francisco Office.

A. Not to my knowledge.

(Testimony of Robert S. Gilmore.)

Q. Did the national office ever give a press release to that effect?

A. I have some recollection that a press release was mentioned in one of the national tax services, either Prentice-Hall or Commerce Clearing House; and, as near as I can recollect, that was sometime during the year 1950 or '51.

Q. And do you remember what the contents of that press release were? [12]

A. Not exactly. I—my only memory is of the general subject. Is that what you wish?

Q. Yes. That's what I am trying to get.

A. The general subject, as I recall, was a notice to taxpayers of the requirements of the law for filing estimated tax and reminder of the penalties in connection therewith.

Q. And that, to your recollection, was published in the year 1950 or 1951?

A. I have no recollection of its publication date. The only thing I remember is the mention that was made in the tax service.

Q. I will reframe the question.

To your recollection, that was mentioned in the tax service in either the year 1950 or the year 1951?

A. That's correct.

Mr. Olshausen: That's all, Mr. Gilmore.

Mr. Mather: No cross examination.

The Court: Very well.

You may stand aside, sir.

(Witness excused.)

The Court: Call your next witness.

Mr. Olshausen: I call Mr. Nickell.

Whereupon,

RICHARD NICKELL

was called as a witness on behalf of the Petitioner and, [13] having been first duly sworn, testified as follows:

The Clerk: Will you give your full name and address, please?

The Witness: Richard Nickell, N-i-c-k-e-l-l, Burlingame, California.

Direct Examination

Q. (By Mr. Olshausen): Mr. Nickell, you are the Assistant District Director of the Internal Revenue Service in San Francisco; is that correct?

A. Yes.

Q. You are now the acting Director?

A. No. I am the Assistant District Director.

Q. Do you know whether a press release was issued from either the local office or the national office in about 1950 or 1951 relating to the necessity of filing both estimated tax returns and forms 1040 on individual income taxes?

Mr. Mather: Counsel, if it would be of any assistance to you, I will stipulate that a press release dated March 13, 1950, was released by Commissioner Shonnaman in which the penalties under Section 294 (d) are reviewed and the escape clause under Section 2924 (d) (2) are discussed.

(Testimony of Richard Nickell.)

Mr. Olshausen: May I see it?

Mr. Mather: No. This isn't it. This is my [14] private paper. I don't have the press release, but I will stipulate, if that's of any assistance to you.

Mr. Olshausen: I will accept the stipulation, but can you give us any——

Q. (By Mr. Olshausen): Are you familiar with the press release which counsel just mentioned?

A. Yes.

Q. Can you give us—do you have copy of it?

A. Yes, I do.

Q. Do you have it here? A. I do.

Q. May I see it?

Mr. Olshausen: I would like to offer this as Petitioner's Exhibit next in order. I imagine that will be No. 2.

Mr. Mather: We have no objection, your Honor, but this is an official document of the Director's office and, as I understand it, it's the only copy they have in their office.

The Court: Well, may we mark it as an exhibit and then allow him to withdraw it and substitute a photostatic copy? Would that be satisfactory?

The Witness: That would be satisfactory.

Mr. Mather: I have no objection, your Honor.

(Petitioner's Exhibit No. 2 was marked for identification.)

The Court: If there is no objection, it will be received in evidence as Petitioner's Exhibit No. 2.

(Testimony of Richard Nickell.)

We were going to mark the 90-day letter as Exhibit No. 1, and you will supply that?

Mr. Olshausen: That's correct, yes.

The Court: This will be Petitioner's Exhibit 2, and I will permit counsel for Respondent to remove that and have it photostated.

Mr. Olshausen: Very well.

The Court: And you can substitute a photostatic copy therefor and return the original to the witness.

Mr. Mather: Very well, your Honor.

(Petitioner's Exhibit No. 2 was received in evidence.)

[See page 46.]

Mr. Olshausen: That's all from this witness.

Mr. Mather: No cross examination.

Mr. Olshausen: I have nothing further. The third witness is dismissed, as far as we are concerned.

(Witness excused.)

The Court: Call your next witness.

Mr. Olshausen: The next witness — I will take the stand myself. [16]

Does the Clerk want to swear me?

The Court: Yes, sir.

Whereupon,

GEORGE OLSHAUSEN

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Court: I take it Mr. Olshausen will testify in narrative form and you will cross examine him after he gets through?

The Witness: Yes. I might say I talked to counsel about this before when the matter was called on the 30th of September, and he said he would not require a question and answer form while I was testifying but he would want to cross examine afterwards.

The Court: Very well.

You may proceed, sir.

Direct Examination

The Witness: My name is George Olshausen. I am the Petitioner in this case. I reside at 1238 Pacific Avenue, San Francisco, California. I am an Attorney at Law, admitted in the courts of California in the year 1926.

By the way, speaking as an Attorney and not as a witness, can we introduce the stipulation of facts now?

Mr. Jones: Yes.

Your Honor, we neglected to introduce this into [17] evidence.

The Court: Very well. You offer in evidence a stipulation?

Mr. Jones: Yes.

(Testimony of George Olshausen.)

The Court: You are offering a stipulation that has been duly signed by both parties?

Mr. Jones: Yes.

The Court: Are there any exhibits attached?

Mr. Jones: No.

The Court: Very well. The stipulation is received in evidence.

The Witness: The stipulation, I believe, states that in the year 1943 I filed both estimated forms and Form 1040; that it was my understanding, and it is my understanding, that the law was changed again in the following year after the first year that estimated tax forms were required to make it optional to file either estimated or Forms 1040. And from the year 1944 or 1945, whichever the first year was there, to and including the year 1953, I filed Forms 1040 every year without filing any estimated tax return, and I received no objections from the Commissioner's Office during that entire 10-year period, until the year 1955, and each of those forms which I filed showed on its face that no estimated tax had been paid.

The Commissioner's Office, however, during that [18] period, made other objections to my tax return.

I have one bill, which I will introduce, for \$10.25 for a miscalculation. In one year I received a refund of \$300, and from time to time I received tax bills for taxes which had already been paid.

And I might say since this case started, on two

(Testimony of George Olshausen.)

occasions I have received tax bills for taxes already paid.

I have attempted to get the old forms from the Bureau of Documents and have gotten some of them; not all of them.

I will offer in evidence later those which I have.

I never saw the press release which appears in this proceeding as Petitioner's Exhibit 2 before I saw it in the courtroom this morning—this afternoon. Excuse me.

During the whole period, in fact during the entire time that I paid taxes previous to 1955, I always used the instructions pamphlet which accompanies 1044 as a reference pamphlet. That is, whenever anything seemed to require explanation on the face of Form 1040, I went to the reference pamphlet. I did not during that period read the reference pamphlet through from cover to cover every year. I used it like a dictionary.

Now, I want to offer in this connection various documents, some of which the authenticity is covered by the stipulation and others not. [19]

First of all, I want to offer a statement of notice of error in computation for the year 1952 for \$10.25 and the check which paid it, dated August 17, 1952. I have mentioned that to counsel, but I haven't shown it to him before.

Mr. Jones: That wasn't in the stipulation.

The Witness: No, because I didn't have it and you said you wanted to wait until you saw it.

Mr. Jones: It is for the year—

(Testimony of George Olshausen.)

The Witness: 1952.

Mr. Jones: For the taxable year '51?

The Witness: Yes. And I want to offer the statement of income tax, too, and the check, as Petitioner's Exhibit 3-A and 3-B.

(Petitioner's Exhibit No. 3-A and 3-B was marked for identification.)

The Court: Any objection, Mr. Jones?

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit 3-A and 3-B—no. You don't have the letters. It would be 3 and 4.

The Witness: Well, I was going to subdivide the exhibit.

The Court: You are going to make it one exhibit?

The Witness: That's right, sir, yes. [20]

The Court: It will be Exhibit 3, Parts A and B.

(Petitioner's Exhibit No. 3-A and 3-B was received in evidence.)

The Witness: Next I want to offer copies of my own income tax returns from 1949 to 1953, both inclusive; and I might say I searched for my old income tax returns and did not find any prior to 1949.

The Court: How many of those are there? How many years?

The Witness: '49 to '53 inclusive.

The Court: And you will introduce those as one exhibit?

(Testimony of George Olshausen.)

The Witness: As one exhibit with subdivisions, yes.

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit No. 4 is received in evidence.

(Petitioner's Exhibit No. 4 was marked for identification and received in evidence.)

The Court: And this Exhibit No. 4 consists of income tax returns filed from 1949 to 1953 inclusive?

The Witness: That's correct, yes.

Next I want to offer the old blanks of—this is covered by the stipulation—the blank forms of 1040 for the years 1943, '44, '45, '46, '47, '48, '49 and '51; in other [21] words, 1943 to '51 inclusive, with the exception of the year 1950.

The Court: I take it there is no objection?

Mr. Jones: There is no objection.

The Court: There being no objection, Petitioner's Exhibit No. 5 is received in evidence.

(Petitioner's Exhibit No. 5 was marked for identification and received in evidence.)

The Witness: Next I want to offer the instruction pamphlet accompanying Form 1040 for the years 1948, 1949, 1950, 1951 and 1952, and I will call attention that I have an instruction pamphlet here that goes back earlier than the earliest Form 1040—no, I withdraw that. I withdraw that last statement.

I have the Forms 1040 back to '43, but these in-

(Testimony of George Olshausen.)

struction pamphlets run from '48 to '51, both inclusive, and they are covered by the stipulation.

The Court: There being no objection, Petitioner's Exhibit No. 6 is received in evidence.

(Petitioner's Exhibit No. 6 was marked for identification and received in evidence.)

The Witness: Next I want to offer my own return for the year 1945 on Form 1040, and since that's beyond the period, I will state the reason for the offer. It is to show that one of the points in the case is that [22] there was no change on the face of Form 1040 relating to the necessity of filing the estimated tax until the new code came in in 1954, and simply to round out the picture and give the Court the possibility of examining the forms both before and after the change in the 1954 code.

I am offering my return for the year 1954.

The Court: No objection?

Mr. Jones: Do you have another copy?

The Witness: No, I don't.

Mr. Jones: That's your copy?

The Witness: That's my copy, yes. But if you have a blank form—I mean I am offering this for the form, not for my form. If you want to introduce a blank, it's all right with me.

Mr. Jones: No. This is all right.

The Court: There being no objection, Petitioner's Exhibit No. 7 is received in evidence.

(Petitioner's Exhibit No. 7 was marked for identification and received in evidence.)

(Testimony of George Olshausen.)

The Witness: Next on the issue that I testified that during the period ending 1953 I was occasionally even billed for taxes already paid. I do not have any of the bills nor the cancelled checks for that period, but I have two of such bills and cancelled checks subsequent to the period, and I offer them in corroboration of the oral testimony which [23] I am not able to corroborate with documents earlier than '53. And this is the bill dated June 11, 1956, for \$1,075.21 estimated tax, alleged that the credits only are zero and the cancelled check for the same amount dated January 8, 1956.

Mr. Jones: Your Honor, I object to that on the ground of relevancy. The fact that he was billed for a mistake occurring in 1956 certainly wouldn't prove a mistake occurred in subsequent or prior period.

The Court: I can't see that it would, but I am going to overrule your objection and, for whatever it is worth, I will receive that in evidence.

The Witness: Thank you.

The Court: Petitioner's Exhibit No. 8 will be received in evidence.

(Petitioner's Exhibit No. 8 was marked for identification and received in evidence.)

The Court: I can't see how it will be material, Mr. Olshausen.

The Witness: It is the only documentary corroboration I have of my testimony for the period involved; and this—another case for the same thing, dated May 16 of this year, and the letter of

(Testimony of George Olshausen.)

billing for the subsequent billing for the same tax and a subsequent letter of September 17 of this year after I was billed a second time for the same tax that had already been paid. [24]

Mr. Jones: We make the same objection, your Honor.

The Court: The same ruling. It will be received for whatever it may be worth. I can't see it being material or competent in any way, but if I find that it is, it will be in the record then for my consideration.

Mr. Jones: Do you have a letter included?

The Witness: That's my own letter, yes. I might say that the original of a copy of this letter which is attached to these three documents was mailed to the Commissioner's Office.

The Court: Petitioner's Exhibit No. 9 is received in evidence.

(Petitioner's Exhibit No. 9 was marked for identification and received in evidence.)

The Witness: The next is two letters, one dated March 16, 1957, and the other one dated April 12, 1957, from the U. S. Treasury Department in Washington, signed K. W. Johnson, Public Information Division, in response to my request for old forms. And I might say that I told counsel about only the second one of these, but that was by inadvertence. They both relate to the same thing.

Mr. Jones: That's what we——

The Witness: The second one is stipulated. The

(Testimony of George Olshausen.)

first one I did not have when we drew up the stipulation.

The Court: There is no objection? [25]

Mr. Jones: No objection.

The Court: There being no objection, Petitioner's Exhibit No. 10 is received in evidence.

(Petitioner's Exhibit No. 10 was marked for identification and received in evidence.)

[See page 49.]

The Court: Anything further?

The Witness: Yes.

In my conference with Mr. Gilmore, which I wrote up in the form of a memorandum immediately after it occurred and which appears as an appendix to the petition, he did make the statement that the Department had not begun to impose or collect penalties for the non-filing of estimated tax returns until the year 1950, and he made the additional statement that by that time they felt that the taxpayers should be acquainted with the new law and so that it was proper to collect penalties from them.

That is my direct testimony.

Cross Examination

Q. (By Mr. Jones): Mr. Olshausen, we also stipulated that you prepared your own income tax returns for all the periods involved?

A. Correct, yes.

Q. Further that in two years you computed your income and took advantage of the provisions of

107?

(Testimony of George Olshausen.)

A. That's correct. In other words, I have not [26] included the stipulation in my direct testimony, but the stipulation is all correct, yes.

Q. For the purposes of further questioning?

A. Yes.

Q. How did you find out how to use or how to compute income under 107?

A. I don't remember that. I think I got it from conversations with other lawyers. In other words, lawyers have contingent cases and I have quite a few contingent cases in the course of my practice, and many of the other lawyers whom I know have the same thing. And, as far as I remember, it came up in conversation that when you have a contingent case which carries on for several years and you get paid at the end of it, you can apportion your fee back to when it started.

Q. But when you prepared your return, how did you find out the exact amount of time involved and exactly how you do it?

A. Well, I just did it by splitting the years. In other words, that first case in which I used it was with a case that went ten years. So I divided it by a 10-year period.

Q. You made no effort to find out how long that—what period 107 covered, how far you could spread back from the—— [27]

A. As far as I remember, I did—the limitation was only the other way, that there had to be a minimum of 36 months.

Q. How did you find that out?

(Testimony of George Olshausen.)

A. I don't remember whether I looked it up or whether some other lawyer mentioned it to me.

Q. You declared and paid estimated income tax in 1943; is that correct?

A. As far as I remember, there was one year. Whether it was '43 or '44 I am not sure. I did in one year, and then again I didn't do it.

Q. You spoke that you were under the impression that the year after you did this, you believed that it was optional whether you——

A. That's correct, yes.

Q. Upon what basis did you reach that decision?

A. I don't remember where I heard that. All I know is that I heard it because I had changed and I changed again. Then I continued the same year—the same way for the next ten years.

Q. Do you recall investigating the law?

A. No. I mean I recall I did not investigate the law. I filed it that way and received no objection, so I continued to file it that way.

Q. Did you look at the reference book, the little [28] manual that goes along?

A. I don't remember. I couldn't say whether I did or not in the year 1944.

Q. Did you ever look at it?

A. Oh, yes. As I say, I looked at the—during the whole period I have always looked at the reference book when there was anything on the face of the Form 1040 which seemed to require explanation.

(Testimony of George Olshausen.)

Q. You wouldn't look in the reference book in the event you were going to change from the declaring and paying from one year to not declaring and paying in the next year? You wouldn't look that up?

A. I can't say. I do know this: This is included in the exhibits which have been introduced; that the reference books before 1950 do not say that you have to file both forms.

Q. You have spoken about various billings that you received prior to the years 1952 and 1953. Were you ever contacted by an Internal Revenue Agent during that period?

A. No. I just got bills in the mail and I paid them. As I say, on one occasion I got a refund in the mail.

Q. Do you know whether most of those were mathematical adjustments? A. I think so, yes.

Q. In connection with this press release which you [29] sought to obtain, did you go down to the library and try to find out if they had a copy of it?

A. No. I didn't even know what it was. In fact, I understood it was a newspaper ad.

Q. Did you go to the library and investigate?

A. No. I didn't even know what year it was.

Q. You didn't go to an index or anything?

A. I might say I never heard of that until my conference with Mr. Barkley in the Fall of 1955.

Q. Two years ago?

A. That was after this case came up, yes.

(Testimony of George Olshausen.)

Q. It was approximately two years prior to trial? A. To trial, yes.

Mr. Jones: That's all.

The Witness: That's our case now. Of course, I assume it is to be briefed, as far as the evidence goes.

The Court: You may stand aside.

(Witness excused.)

Mr. Jones: We have no additional evidence.

The Court: The Respondent rests.

Mr. Jones: Yes.

The Court: The Petitioner rests?

Mr. Olshausen: Yes.

The Court: Very well. How much time will you want for filing your original brief, Mr. Olshausen?

Mr. Olshausen: Well, I am in the middle of another brief now. If I could have 30 days I think I can get it in.

The Court: Well, you have at least 45.

Mr. Olshausen: Oh, well, then, I am as good as certain I can get it in 45 days.

The Court: I will give you the exact date on which it is due.

What would 45 days file on?

The Clerk: Make that November 18, Monday.

The Court: Very well. Petitioner will file his original brief on or before November 18.

Mr. Olshausen: And if I should need an extension on that, I assume I will be able to get it?

The Court: Yes. Before the date arrives, you send in a written application to Washington ask-

ing for an extension of time, if you find that it is impossible to get your brief in.

Mr. Olshausen: That's November 18, that date?

The Court: November 18.

And 30 days from that date would be what, Mr. Clerk?

The Clerk: Make that December 18.

The Court: Respondent will file answer brief on or before December 18. [31]

20 days from that date would be what date now? Well, that would make it about January 18.

Your reply brief, Mr. Olshausen, will be filed on or before January 8, 1957.

Mr. Olshausen: Now, there is just one thing. Will these exhibits remain in San Francisco? I am going to need the exhibits to write the brief.

The Court: No.

Will you gentlemen need them for your brief also?

Mr. Mather: No, your Honor. We won't need them.

The Court: If someone will undertake to return those just as rapidly as possible, I wouldn't object to the Clerk leaving them with you. You tell the Clerk what exhibits you desire to keep.

Mr. Olshausen: I think I will need all of them.

The Court: Give him your receipt for them and return them to Washington just as soon as you are through—at the earliest possible moment.

Mr. Olshausen: Yes.

The Court: Is there anything further in connection with this case?

Mr. Jones: No, your Honor.

The Court: Very well. If there is nothing further, we will be recessed until 2:00 o'clock tomorrow [32] afternoon.

(Whereupon, at 2:50 o'clock p.m., Thursday, October 3, 1957, the hearing in the above-entitled matter was closed.) [33]

[Endorsed]: T.C.U.S. Filed October 15, 1957.

PETITIONER'S EXHIBIT No. 2

Treasury Department
Information Service
Washington 25, D.C.

Encl. to Mim., Coll. No. 6506

S-2286

Immediate Release,

Monday, March 13, 1950.

George J. Schoeneman, Commissioner of Internal Revenue, today called the attention of taxpayers to the importance of filing Declarations of Estimated Tax for 1950, as well as filing income tax returns for 1949, by March 15. Declarations are due on that date from several million persons.

The Bureau of Internal Revenue is required by law to give application to the statutory penalties for failure to file a declaration on time, for failure to make required payments, and for substantial underestimation of tax.

The Declaration of Estimated Tax, filed on Form

Petitioner's Exhibit No. 2—(Continued)

1040ES, is part of the pay-as-you-go system of tax collection which was inaugurated by law in 1943. In the case of most wage-earners, sufficient tax is withheld from wages to keep such persons substantially paid up on their income taxes. However, many taxpayers are not subject to withholding, or their withholding is insufficient to pay their taxes, and the Declaration of Estimated Tax is a means of keeping them substantially current on their income tax payments.

Generally, declarations must be filed by business and professional people, investors, landlords, and other taxpayers who expect to get over \$600 income of which at least \$100 is from sources not subject to withholding during 1950, and also by wage-earners who—even though subject to withholding—expect to earn this year more than \$4,500 plus \$600 for each of their exemptions (for example, \$5,100 in the case of a single man with no dependents, \$5,700 in the case of a married man with a wife and no dependents, etc.).

Commissioner Schoeneman pointed out that no taxpayer, subject to filing a Declaration, can avoid this responsibility on the ground that it may be difficult to estimate income and tax in advance. The Commissioner advised such persons that the law provides them with ample opportunity to correct their estimates at later dates, but does not excuse the failure to make as good an estimate as the taxpayer can reasonably be expected to make.

Petitioner's Exhibit No. 2—(Continued)

He explained that a Declaration filed on March 15 can be amended, if the taxpayer desires, on June 15, or on September 15, or even as late as January 15, 1951. Even then, a taxpayer will not be penalized if his estimate does not fall short of the correct tax by more than 20 per cent.

Nor will any penalty be applied if a taxpayer bases his estimate on last year's income and figures his tax on this year's rates and exemptions.

Although farmers are required to file declarations, they are allowed by a special law to postpone filing declaration until January 15 of the following year, and need not file a declaration at all if they file their final income tax returns by January 31.

The penalty for failing to file on time or to make payments on time, in the case of declarations, is 5 per cent of the unpaid tax which is due, plus 1 per cent for each month of delay, but the overall penalty for this cause cannot exceed 10 per cent of tax.

The penalty for underestimating by more than 20 per cent ($33\frac{1}{3}$ per cent in the case of farmers) is 6 per cent of the difference between the estimated and the correct tax.

Taxpayers needing forms or information in connection with Declarations of Estimated Tax are invited to consult the nearest office of a Collector of Internal Revenue.

Admitted in Evidence October 3, 1957.

PETITIONER'S EXHIBIT No. 10

U. S. Treasury Department
Washington 25

March 6, 1957

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue, Washington 25, D. C. and Refer to C:I.

Mr. George Olshausen
1238 Pacific Avenue
San Francisco 9, California

Dear Mr. Olshausen:

Your letter dated January 28, 1957 addressed to the Government Printing Office was referred to us for reply. You ask for Forms 1040 for 1943 to 1948 inclusive.

It is indeed regretted that your letter has been handled so many times. However, for future guidance may we submit that internal revenue forms are neither sold or distributed by the Government Printing Office. Naturally they sent your letter to the District Director in San Francisco, California not knowing that supplies of out dated returns are not stocked by our field offices, nor, here in Washington.

Forms 1040 for years on which the statute of limitations has ordinarily run are not stocked. However, we have a return for each year, 1943, 1944, 1947, 1948. They are enclosed.

It is not known by us where you might obtain re-

Petitioner's Exhibit No. 10—(Continued)
turns for 1945 and 1946. There are none available here.

We hope the enclosed returns will serve you some useful purpose and we are pleased to be of this service to you.

Very truly yours,

/s/ K. W. JOHNSON,

K. W. Johnson,

Public Information Division.

[Stamped]: Received—Taxed Court of the United States, 1957, Dec. 16, P.M. 3:30.

U. S. Treasury Department
Washington 25

April 12, 1957

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue, Washington 25, D. C. and Refer to C:I.

Mr. George Olshausen
1238 Pacific Avenue
San Francisco 9, California

Dear Mr. Olshausen:

It is regretted that we do not have a stock of instructions for individual income tax returns which were to be filed for the years 1943-1948. This applies also to the older forms themselves.

As a special favor we managed to scare up single returns which were sent you under date of March

Petitioner's Exhibit No. 10—(Continued)

6, 1957. It is doubtful if we could repeat.

We would like to make it clear that not all outdated forms and instructions are destroyed. However, you will understand how impossible it would be to stock a supply of returns not actually needed by the taxpaying public. The Archives and Library of Congress of course keep samples for those doing research work. One of your local libraries may also have them for this purpose. In most instances our supply just runs out and there is no necessity for reprinting.

This is in reply to your letter dated April 9, 1957.

Very truly yours,

/s/ K. W. JOHNSON,

K. W. Johnson,

Public Information Division.

[Stamped]: Received—Tax Court of the United States, 1957, Dec. 16, P.M. 3:30.

Admitted in Evidence October 3, 1957.

T. C. Memo. 1958-85

Tax Court of the United States

George Olshausen, Petitioner, vs. Commissioner of
Internal Revenue, Respondent.

Docket No. 61127. Filed May 13, 1958.

George Olshausen, pro se.

Leslie T. Jones, Jr., Esq., and T. M. Mather, Esq.,
for the respondent.

MEMORANDUM FINDINGS OF
FACT AND OPINION

This proceeding involves a deficiency in additions to the tax under section 294 of the Internal Revenue Code of 1939 for each of the years 1952 and 1953, as follows:

Year	Deficiency	Additions to the tax under	
		Sec. 294(d) (1) (A)	Sec. 294(d) (2)
1952	—	\$734.84	\$489.92
1953	—	114.73	76.50

The issues are: (1) Whether the respondent may proceed by notice of deficiency where the determination involves only additions to the tax; (2) whether such proceeding violates the Fifth and Seventh Amendments to the Constitution; (3) whether the respondent is barred by laches; (4) whether the respondent erred in determining that the failure to file a declaration of estimated tax was not due to reasonable cause; and, (5) whether the respondent properly determined additions to the tax for substantial understatement of estimated tax.

Findings of Fact

Some facts have been stipulated and are found accordingly.

Petitioner is an individual residing at 1238 Pacific Avenue, San Francisco, California. His returns for the taxable years involved were filed with the director of internal revenue for the district of San Francisco, California.

Petitioner is an attorney and has practiced in the courts of California since 1926.

During the taxable years in question the petitioner did not file a declaration of estimated tax.

Petitioner filed a declaration of estimated tax in either 1943 or 1944. Under the belief the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive.

On January 15th of each year petitioner regularly filed Form 1040 and paid the tax shown to be due. Petitioner stated he was under the impression that the filing of a declaration of estimated tax was optional if Form 1040 was filed on January 15th. Petitioner was unable to recall how he gained the impression a declaration was unnecessary. Petitioner made no investigation of the law.

During the period 1945 to 1953, inclusive, the returns filed on Form 1040 by the petitioner disclosed his failure to file the declarations of estimated tax.

During the period between 1944 and 1953, petitioner received a refund and was billed for additional amounts due. During such period petitioner was not contacted by the Internal Revenue Service

and believes the adjustments referred to were mathematical.

In each of the years 1946 and 1950, petitioner reported income apportioned under section 107 of the 1939 Code. Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section.

In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to section 294 of the Code. Petitioner was unaware of such release until it was called to his attention at a conference with revenue agents which occurred in the fall of 1955.

In the deficiency notice, the respondent made the following explanation:

You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

Petitioner's failure to file declarations of esti-

mated tax for the taxable years 1952 and 1953 was not due to reasonable cause.

Opinion

LeMire, Judge: The respondent determined additions to the tax under section 294 of the internal Revenue Code of 1939 against petitioner for each of the taxable years 1952 and 1953.

The amounts of the additions to the tax determined by the respondent are not in dispute. Petitioner makes no claim that he filed a declaration of estimated tax in the taxable years involved.

Petitioner is a lawyer appearing pro se. His primary contention is that the respondent is not authorized to proceed by notice of deficiency where only additions to the tax are determined, and the notice here in question is not a notice of deficiency within the definition of section 271 of the Code. We find no merit in such contention. It is well settled that a notice involving merely additions to the tax under section 294 is a deficiency notice under section 271, and that the filing of a petition with this Court confers jurisdiction. *Herbert Eck*, 16 T.C. 511, *affd.* 202 F. 2d 750, *certiorari denied* 346 U.S. 822; *E. C. Newsom*, 22 T.C. 225, *affd. per curiam* 219 F. 2d 444; *Union Telephone Co.*, 41 B.T.A. 152; *Ely & Walker Dry Goods Co. v. United States*, 34 F. 2d 429; *certiorari denied* 281 U.S. 755; *Charles E. Myers, Sr.*, 28 T.C. 12.

The petitioner further argues that to uphold the respondent's right to proceed by deficiency notice

deprives him of the right to a jury trial under the Seventh Amendment, and violates the due process clause under the Fifth Amendment to the Constitution.

The constitutionality of sections 58 and 294 here involved has recently been considered and upheld. *Erwin v. Granquist*, F. 2d (Feb. 13, 1958) certiorari applied for. The Seventh Amendment, relating to a jury trial, applies only to actions at law and not to statutory proceedings. *Wichwire v. Reinecke*, 275 U.S. 101. Petitioner could pay the tax, sue for refund, and thus have a jury trial. We find no merit in either of petitioner's contentions. The defense of laches is equally without merit. The Supreme Court in a number of cases has held that the United States is not subject to the defense of laches, if any here exist. *United States v. Summerlin*, 310 U.S. 414, 416 (citing authorities).

The issue whether the petitioner's failure to meet the requirements of section 58 was due to reasonable cause and not to wilful neglect presents a factual questions to be resolved upon the merits.

Section 294(d)(1)(A) imposes the duty upon the Commissioner to determine, in the first instance, whether or not the failure to file a declaration of estimated tax is due to reasonable cause. Such a determination was made and is *prima facie* correct. The burden is upon the petitioner to establish that the failure was due to reasonable cause. *Wickwire v. Reinecke*, *supra*; *Welch vs. Helvering*, 290 U.S. 111.

Reasonable cause is defined as the "exercise of

ordinary business care and prudence." In *re Fisk's Estate*, 203 F. 2d 358. Petitioner contends that the evidence in the instant case brings him within that definition.

As justification for his failure to file the declarations, petitioner contends that no one connected with the revenue service ever called his attention to the necessity of filing declarations, although his regular returns filed on Form 1040 clearly disclose that he had not filed any declarations. Ignorance of the law is no excuse. The record, however, shows that petitioner was familiar with the requirements of the law since in either 1943 or 1944 he did file such a declaration.

Petitioner testified that he gained the impression that there had been a change in the policy of the Internal Revenue Service not to require a declaration where Form 1040 was filed by January 15th. Petitioner could not recall where he gained such impression.

As an additional excuse, petitioner testified that Form 1040 made no reference to the necessity to file a declaration and since the questions pertaining to withholding on Form 1040 were not changed over the years, he did not examine the instruction pamphlet.

Petitioner could not rely upon the failure of the revenue service to call his omission to his attention. This record persuades us that petitioner did not use reasonable diligence in ascertaining his duty to comply with the law. Any reasonable and prudent person would not rely upon an impression, but

would consult the current law. Neither indifference nor reliance upon rumor constitute reasonable cause. Howard M. Fischer, 25 T.C. 102; Harold C. Marbut, 28 T.C. 687; Charles M. Kilborn, 29 T.C. 102 (on appeal C.A.-5).

Upon the entire record we are of the opinion that petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause and we have so found as a fact.

Finally, petitioner contends that since he filed no declarations of estimated tax, the additions to the tax under section 294(d)(2) cannot be sustained. A number of District Court decisions support the petitioner.¹

This Court has consistently held that the additions to the tax under sections 294(d)(1)(A) and 294(d)(2) are cumulative. G. E. Fuller, 20 T.C. 308; H. R. Smith, 20 T.C. 663; Harry Hartley, 23 T.C. 353; Clark v. Commissioner, F. 2d (Mar. 13, 1958) affirming a memorandum opinion of this Court. See also, Peterson v. United States, 141 F. Supp. 382; Furrow v. United States, 150 F. Supp. 581; Palmisano v. United States, 159 F. Supp. 98.

The respondent's determination as to the additions to the tax under sections 294(d)(1)(A) and

¹ United States v. Ridley, 120 F. Supp. 530; Jones v. Wood, 151 F. Supp. 678; Owens v. United States, 134 F. Supp. 31; Powell v. Granquist, 146 F. Supp. 308; Stengle v. United States, 150 F. Supp. 364; Barnwell v. United States,, F. Supp. (Feb. 4, 1958).

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petitioner hereby files its petition for review of the decision of the Tax Court of the United States under the provisions of Section 1142 of the Internal Revenue Code of 1939, as continued in effect by Section 7851(b)(1) of the Internal Revenue Code of 1954.

I.

The facts relating to same are as follows:

Petitioner is and was at all times herein mentioned an individual, a resident of the City and County of San Francisco, State of California.

The notice of deficiency issued by the Collector of Internal Revenue was issued from the Office of the San Francisco District Director of Internal Revenue.

The hearing before the Tax Court whose decision is sought to be reviewed was held in San Francisco, California.

II.

The nature of the controversy and the contentions of the parties are as follows:

Respondent, Commissioner of Internal Revenue imposed on petitioner "additions" to the income tax for the years 1952 and 1953 for non-filing of estimated tax returns for those years, which non-filing the Tax Court has found to be due to "wilful neglect" and not to "reasonable cause." Said addi-

tions were imposed for both years both under sections 294 (d)(1)(A) and 294 (d)(2) of the Internal Revenue Code of 1939. The deficiency notice refers to these additions as "penalties". There is no claim of any nonpayment or underpayment of tax.

In 1952 and 1953 petitioner filed Form 1040 and paid taxes in accordance with Form 1040 without filing any estimated tax returns; he had done so each year since 1944 or 1945. Each year since 1944 or 1945 it appeared on the face of petitioner's Form 1040 returns that no estimated tax return had been filed.

During these years the Commissioner of Internal Revenue notified petitioner of mistakes in calculation in his returns either billing him for additional tax or (on one occasion) sending a refund, but at no time prior to the fall of 1955 did respondent raise any objection to the non-filing of estimated tax returns.

The Commissioner issued a deficiency notice for these "additions" alone (not claiming any deficiency in the tax itself) claiming cumulative "additions" (or "penalties", in the language of the deficiency notice) both for non-filing of estimated tax returns under section 294(d)(1)(A) and for alleged "substantial underestimation" under section 294(d)(2).

The Tax Court rendered decision for the respondent, holding as follows either expressly or by implication:

(1) That the procedure of a deficiency notice

may be used to enforce claims for the "additions" ("penalties") to the tax provided by section 294 of the Internal Revenue Code of 1939, even where there is no claim of any deficiency in the tax itself.

(2) Such procedure is constitutional as applied, and was not a denial of jury trial or of due process of law.

(3) That after seven or eight years during which the collector has without objection accepted taxes paid under Form 1040, it is "wilful neglect" to continue to follow the same procedure, particularly where no instructions pamphlet prior to the one for 1950 stated that both forms had to be filed, and in view of the facts that there was no change in form 1040, and the statement requiring in the 1950 pamphlet was in ordinary type in the middle of an inside page.

(4) That the inverted burden of proof established by Rule 32 of the Tax Court applies to claims for the "additions" provided for by section 294 of the Internal Revenue Code, even where there is no claim of any deficiency in the tax itself; that such inverted burden of proof is constitutional as applied to such additions ("penalties").

(5) That the additions provided by 1939 Code section 294(d)(1)(A) and those provided by 1939 Code section 294(d)(2) are cumulative, and may both be imposed for the same omission.

(6) That respondent's claim was not barred by

laches even though respondent had because of lapse of time destroyed evidence relevant to the issues.

(7) The Tax Court ignored the argument that the respondent cannot increase its claim by its own delay, and was therefore in any event limited to the amount which it could have recovered had it acted promptly, to wit: \$48.97 (an argument not contested by attorneys for respondent); by affirming it in effect overruled this contention.

(8) Records which had been destroyed by respondent, as too old included instructions pamphlets accompanying forms 1040. At the trial the earliest produced was the one for 1949, offered by plaintiff. After the decision (but before the decision reached San Francisco) petitioner found a copy of the instructions pamphlet for 1948 and moved to reopen the proof to admit this 1948 instructions pamphlet; on May 29, 1958 the Tax Court denied this motion on the ground that the 1948 instructions pamphlet was supposedly "cumulative" to the instructions pamphlets for other years which were already in evidence.

Petitioner's contentions on the above mentioned points are respectively as follows:

(1) That the literal meaning of sections 294 and 271 and 272, of the Internal Revenue Code of 1939 (re-enacted in the Code of 1954) does not extend the deficiency-notice procedure to claims for "additions" under section 294 where there is no claim of deficiency in the tax itself; that such literal construction avoids constitutional issues;

(2) that any other construction of said sections 271, 272 and 294 of the Internal Code of 1939 would be a violation of the petitioner's constitutional rights in that it would deny a jury trial in violation of the VIIth (or perhaps the VIth) Amendment to the United States Constitution in denying a jury upon the trial of a claim for money based upon alleged fault; and that application of the inverted burden of proof under Rule 32 of the Tax Court applied to such a claim deprives petitioner of property without due process of law in violation of the Vth Amendment to the United States Constitution;

(3) that under the authorities "wilful neglect" requires a "bad purpose"; that upon the present record as a matter of law no "wilful neglect" is shown in the non-filing of estimated tax returns in the two final years of an eight-year period; that the Tax Court's finding to the contrary was unsupported by evidence and capricious; that its legal conclusion to the contrary was not supported by its own findings of probative facts and therefore capricious (*Helms Bakery v. C.I.R.*, 236 F 2d 3);

(4) that, in any event, petitioner was denied due process of law in violation of the Vth Amendment to the United States Constitution in that the Tax Court measured the evidence on the present claim according to the inverted burden of proof provided for in Tax Court Rule 32;

(5) that the subdivisions of section 294 of the Internal Revenue Code of 1939 are not cumulative,

and section 294(d)(2) does not apply at all to the non-filing of an estimated tax return;

(6) that the forms 1040 and accompanying instructions pamphlets for years preceding 1952 are relevant to the issue of "good cause" versus "wilful neglect"; that after having destroyed these documents as too old, the respondent denied due process of law to petitioner in violation of the Vth Amendment to the United States Constitution in pressing a claim on which it had destroyed relevant evidence; that for the same reasons respondent was guilty of laches which upon these facts operates against the government;

(7) that respondent cannot consistently with due process of law under the Vth Amendment to the United States Constitution, increase its claim by its own delay, and it is limited at most to the amount which it could have recovered if it had acted immediately, to-wit, \$48.97.

III.

The petitioner being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court, and by its decision entered herein, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ GEORGE OLSHAUSEN,
Petitioner.

[Title of Tax Court and Cause.]

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

Petitioner intends to Rely upon all the Points mentioned in the Petition for Review, particularly on the following:

1. Neither the provisions of the Internal Revenue Code of 1939 (of which sections 271, 272, 294 are the relevant sections) nor the provisions of the Internal Revenue Code of 1954 (of which section 6212 is the relevant procedural section) make the deficiency notice procedure applicable to the "additions" ("penalties") under section 294 of the 1939 Code when such "additions" are not coupled with any tax deficiency.

2. Any other construction would raise serious constitutional questions; in particular that petitioner was thereby denied a jury trial in violation of the VIIth Amendment if the "additions" ("penalties") under section 294 are civil or in violation of the VIth Amendment if the "additions" ("penalties") are considered criminal; and that petitioner was denied due process of law in violation of the Vth Amendment by application of the inverted burden of proof to the present state of facts under the provisions of Rule 32 of the Tax Court; and was denied due process of law in that the original finding of fault underlying imposition of "additions" ("penalties") was made by executive officer who has responsibility of collecting revenue; any other con-

struction would in fact violate the above constitutional provisions as to petitioner.

3. The evidence, as a matter of law, does not show wilful neglect, but on the contrary shows reasonable cause for non-filing of estimated tax returns for the years 1952 and 1953, and the Tax Court's finding to the contrary is arbitrary and capricious.

In this connection the following finding of the Tax Court shows a misreading of the testimony:

"In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040."

The testimony is that reference to the instructions pamphlet was made whenever Form 1040 seemed to require further elucidation, not merely when Form 1040 referred to the instructions pamphlet. Besides, the instructions pamphlet always (not "usually") accompanied Form 1040.

4. The Tax Court's legal conclusion of "wilful neglect" and failure to show reasonable cause is unsupported by its findings of probative facts.

5. The provisions of section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all.

6. The government having heretofore destroyed as too old, evidence which is relevant to the issues of this case deprives petitioner of due process of law

by now pressing the claim; for which reason the government is barred by laches.

7. The government cannot, consistently with due process increase its claim by its own delay; hence it is at most limited to what it might have recovered, if it had acted promptly, to-wit, \$48.97.

8. The Instructions Pamphlet for the year 1948 was relevant to the issues and not cumulative to the instructions pamphlet for other years; hence its exclusion was error.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed August 6, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers on file in my office as called for by the Designation of Contents of Record, including Petitioner's Exhibits 1, 2, 3-a, 3-b, 4 thru 10, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket

entries in said Tax Court case, as the same appear in the official docket of my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of September, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the United
States.

[Endorsed]: No. 16183. United States Court of Appeals For the Ninth Circuit. George Olshausen, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: September 12, 1958.

Docketed: September 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16183

GEORGE OLSHAUSEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF RECORD AND STATE-
MENT OF POINTS ON PETITION FOR
REVIEW

Petitioner hereby adopts the Designation of Contents of Record on Review, Supplemental Designation of Contents Of Record on Review and Statement of Points to be relied on on Review all heretofore filed with the Tax Court in the above entitled matter (Tax Court Docket No. 61127) and transmitted to this Court as part of the Tax Court Record.

/s/ GEORGE OLSHAUSEN,
Petitioner.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 22, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by counsel for the respective parties herein that, subject to the approval of the Court, and notwithstanding any previous designations for printing, that only the following items be included in the printed record in the above-entitled case:

1. Petition and Exhibit A
2. Answer
3. First, Second and Third Amendments to Petition
4. Answers to First, Second and Third Amendments
5. Conditional Demand for Jury Trial—Denied
6. Stipulation of Facts
7. Transcript of Testimony
8. Petitioner's Exhibits 2 and 10
9. Tax Court Memorandum Findings of Fact and Opinion
10. Tax Court Decision

* * * * *

13. Petition for Review with Statement of Points
14. This Stipulation.

It is further stipulated that this Court and counsel may refer in its opinion, or in their briefs, and

on oral argument to any item in its original state which had previously been designated for printing by counsel for the petitioner and which has been omitted by this stipulation from the printed record with the same force and effect as if it had been printed.

Dated: October 23, 1958.

/s/ GEORGE OLSHAUSEN,
Counsel for the Petitioner.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Counsel for the Respondent.

[Endorsed]: Filed November 7, 1958. Paul P. O'Brien, Clerk.

No. 16,183

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE OLSHAUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

GEORGE OLSHAUSEN,

1238 Pacific Avenue,

San Francisco 9, California,

Petitioner.

FILED

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PAUL P. GARDNER, CLERK

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No. 16,183

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE OLSHAUSEN,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is a petition to review a decision of the Tax Court of the United States.

The petitioner is an individual, a resident of San Francisco who at all times mentioned filed individual income tax returns at the San Francisco office of the Commissioner of Internal Revenue. (R. 17.) The hearing before the Tax Court was held in San Francisco. (R. 18.) The proceedings were held pursuant to a 90-day letter issued by the district director of the San Francisco office of the Commissioner of Internal Revenue (R. 6-9), a petition for redetermination by the taxpayer (R. 3-9); answer thereto by the Commissioner of Internal Revenue (R. 9-10), three

amendments to the petition with the answers to each. (R. 10-16.)

The findings of fact and opinion of the Tax Court were rendered May 13, 1958 (R. 52-59); the decision on May 16, 1958. (R. 59.) The petition for review and statement of points relied on were filed on August 6, 1958. (R. 60-68; date given on R. 68.)

The Tax Court had jurisdiction under 26 USC 7451, 7453, Tax Court Rule 7 (26 USC following sec. 7453). The Court of Appeals of the Ninth Circuit has jurisdiction under 28 USC 7482, 7483.

STATEMENT OF FACTS.

The entire record (apart from exhibits sent up as originals) comprises only 72 pages.

The deficiency notice claims for "additions" to the tax for the years 1952 and 1953, under 1939 Code, 26 USC 294(d)(1)(A) and 294(d)(2). (R. 7-9.) Sec. 294(d)(1)(A) imposes an "addition" to the tax for failure to file an estimated tax return; sec. 294(d)(2) imposes a different "addition" for substantial underestimation.

Section 294(d)(1)(A) does not impose any additions where nonfiling was "due to reasonable cause and not to willful neglect". Section 294(d)(2) allows no exceptions in the event of "substantial underestimation".

The deficiency notice describes the "additions" as "penalties." (R. 6 ft.—"1952 Income Tax Penalties"—"1953 Income Tax Penalties".)

There is no claim for any deficiency in the tax itself.

R 7-8:

“Year: 1952—net income as shown on the return
—*unchanged* . . .

* * * * *

“Tax liability as shown on the return account
No. AP5210, San Francisco District—*unchanged*
. . . .”

* * * * *

“Year: 1953—net income as shown on the return
—*unchanged* . . .”

“Tax liability as shown on the return Account
NO. AP35226, San Francisco District—*un-
changed* . . .” (Italics added.)

The years 1952 and 1953 were the *last two years* of a *nine or ten year period*, during all of which petitioner had, *without any objection from the respondent* filed only Forms 1040, without filing any Estimated Tax returns. All of these returns on Form 1040 showed on their face that no estimated tax return had been filed. (See Stipulation as to Facts, R. 16-18; Findings, R. 53.)

Instructions pamphlets accompanying Form 1040 were introduced for the years 1948-1950 both inclusive. (Exhibit No. 6, R. 37.) Before the trial petitioner had attempted to secure even earlier pamphlets, but the Commissioner destroys all which antedate the statute of limitations. (See Exhibit 10, R. 49-51.)

Of the pamphlets introduced in evidence *neither the one for 1948 nor the one for 1949 says that both Form 1040 and the estimated tax return has to be filed.*

Petitioner testified that this was true also of still earlier pamphlets.

R. 43 "A . . . I do know this: This is included in the exhibits which have been introduced; that the reference books before 1950 do not say that you have to file both forms".

The Tax Court made no finding on this point. (Findings, R. 53-55.)

The instructions pamphlet for the taxable year 1950 (issued in 1951) was *the first instructions pamphlet which stated that both forms had to be filed* (Form 1040 and the estimated tax return). (See Exhibit 6, R. 37.) (Unless we assume vacillations on the Commissioner's part—*See infra.*)

In the meantime, however, on March 13, 1950, the Commissioner's office issued a press release, stating that both forms had to be filed. (Exhibit 2, R. 46-48.) Petitioner did not know of the existence of this press release until it was mentioned by revenue agents in conference in 1955. (Findings, R. 54.) The press release was apparently an attempt to *amend the instructions pamphlets through the newspapers.*

While over an eight or nine year period the Commissioner never once objected to the non-filing of estimated tax returns, corrections were made from time to time (and promptly) of minutiae in petitioner's returns. Thus, in 1952, within a few months after the filing of the return for the year 1951, the Commissioner caught a mathematical error of \$10.25. (Exhibit 3, R. 35.) There were some similar bills at other

times and once a \$300 refund. (Findings, R. 53; R. 33.)

Upon these facts, the Tax Court found that "petitioner has not carried the burden of showing that his failure to file declarations of estimated tax in the taxable years 1952 and 1953 was due to reasonable cause . . ." (R. 52, 54-55.) It affirmed the assessment of cumulative penalties under both sec. 294(d)(1) (A) and 294 (d)(2). (R. 59.)

The petition for review to the Court of Appeals and statement of points to be relied on, is to be found at R. 60-68.

The contentions raised may be summarized as follows:

1. a. Where as here, no deficiency is claimed in the tax itself, the deficiency notice procedure cannot be used to enforce claims for the "additions" ("penalties") under sec. 294(d) of the 1939 Code;

- b. If the deficiency notice procedure were applied to such claims, it would raise serious constitutional questions in each of the following respects:

- (1) Denial of due process of law under the Vth Amendment in that the burden of proof is inverted under Tax Court rule 32, especially after a finding of fault by the same executive officer who has the obligation to find and collect revenue;

- (2) Denial of jury trial in violation of the VIIth (or perhaps the VIth) amendment;

2. The record does not show "wilful neglect" either as a matter of law or as a matter of fact;

3. Since the government has destroyed relevant evidence as too old, the government's claim is barred by laches; enforcement under these circumstances would amount to taking of property without due process, in violation of the Vth Amendment;

4. The provisions of Sec. 294(d)(1)(A) and 294(d)(2) are not cumulative; in a case of non-filing, the section on non-filing (294(d)(1)(A)) is the only one which is pertinent.

5. If the government had acted immediately, it would have collected on earlier years which were much lower than those involved, particularly than 1952; the government cannot consistently with due process under the Vth Amendment, increase its claim by its own delay; its recovery here is limited at most to what the government could have gotten (assuming it could get anything) by acting promptly, to-wit \$48.97.

Further details will be stated where necessary in connection with the argument.

We take the above points in order.

**I. THE PRESENT CLAIM CANNOT BE ENFORCED BY
DEFICIENCY NOTICE PROCEDURE.**

Point "(1)" in petition for review, and "1" in statement of points on which petitioner intends to rely:

R. 63-4 "(1) That the literal meaning of sections 294 and 271 and 272, of the Internal Revenue Code of 1939 (re-enacted in the Code of 1954) does not extend the deficiency notice pro-

cedure to claims for 'additions' under section 294 where there is no claim of deficiency in the tax itself; that such literal construction avoids constitutional issues;

(2) that any other construction of said sections 271, 272, and 294 of the Internal (sic) Code of 1939 would be a violation of petitioner's constitutional rights in that it would deny a jury trial in violation of the VIIth (or perhaps the VIth) Amendment to the United States Constitution in denying a jury trial upon the trial of a claim for money based upon alleged fault; and that application of the inverted burden of proof under Rule 32 of the Tax Court applied to such a claim deprives petitioner of property without due process of law in violation of the Vth Amendment to the United States Constitution;''

These two points are repeated in *statement of points on which petitioner intends to rely*, R. 66-7.

Since the deficiency notice does not claim any tax deficiencies but only additions ("penalties") under sec. 294 of the 1939 Code, it does not set forth facts sufficient to sustain a liability. If the government has any claim for penalties or other additions (which we do not admit) such claim may be enforced only by different procedure (probably an action in the District Court). This follows both from the language of the statute, and because a contrary interpretation would raise serious questions of constitutional law, which are to be avoided.

This defense is raised by the third amendment to the petition. (R. 14-15.)

**A. STATUTES DO NOT MAKE DEFICIENCY NOTICE APPLICABLE
WHERE NO TAX DEFICIENCY CLAIMED.**

Since the years in question are 1952 and 1953, the case is governed by the 1939 Code. We shall show, however, that the same result follows if the 1954 Code is held to govern procedural matters.

1. Deficiency Notice Unavailable Under 1939 Code.

The availability of the deficiency notice procedure depends, *first*, upon the section defining the payments claimed in the present proceeding, and *second* the sections setting forth the circumstances under which a deficiency notice may be used.

a. Nature of Claims.

As the 90 day notice (Pet. Ex. 1) shows, the claims are *entirely* under sec. 294(d)(1)(A) and sec. 294(d)(2).

Sec. 294(d)(1)(A) covers alleged failure to file a declaration of estimated tax and provides that in case of failure to make and file a declaration of estimated tax—*there shall be added to the tax 5 per centum of each installment due . . .*” (Emphasis added.)

Sec. 294(d)(2) covers substantial underestimate of estimated tax, and provides that in case of substantial underestimation “*there shall be added to the tax an amount equal to such excess or equal to 6 per centum of the amount*” . . . , etc. These “additions” *are not part of the tax itself*. This is clear not only from the language of the quoted subsections, but also from the use of *different* language in other parts of section 294.

Thus Sec. 294(a)(1) states the “general rule” to be that if the tax or any part thereof is not paid on time “there shall be collected *as part of the tax* interest upon such unpaid amount at the rate of 6 per centum per annum . . .” (Emphasis added.)

This shows that the words in Sec. 4 are carefully chosen: the interest in subd. 294(a)(1) is part of the tax; the “additions” in subd. 294(d)(1)(A) and 294(d)(2) are *not part of the tax*. A proceeding to collect these “additions” is *not* a proceeding to enforce payment of any tax.

b. History of Statutes and Language of Other Sections Supports Same Conclusion.

Both the history of the provisions contained in 1939 Code Sec. 294 and the contrast between the provisions of sections 294 and 293 indicate that the “additions” under section 294 were intended neither to be part of the tax nor to be enforced as part of the tax.

(1) History of Antecedents of 1939 Code, Section 294.

In both the Revenue Acts of 1918 and 1921 it was provided that the additions for non-filing of returns should be collected *as part of the tax*.

This is pointed out and applied in the cases of *Ely & Walker v. U.S.*, 34 F. 2d 429 (act of 1918) and *Schneider v. U.S.*, 119 F. 2d 215 (act of 1921).

In the *Ely & Walker case v. U.S.*, the court quoted, 34 F. 2d 429, 430:

“‘If the under statement is false or fraudulent with intent to evade the tax, then, in lieu of the penalty provided by section 3176 of the Revised

Statutes, as amended, for false or fraudulent returns, willfully made, but in addition to other penalties provided by law for false or fraudulent returns, *there shall be added as part of the tax fifty per centum of the deficiency* (Italics ours).’ ”

In *Schneider v. U.S.*, 119 F. 2d 215, 217, it was said:

“Under § 250 (b) of the Revenue Act of 1921, 42 Stat. 227, 264, C. 136, which governs the taxpayer’s liability for the tax deficiency and penalty assessed, the penalty was added ‘as part of the tax’.”

In short, this device was familiar at the time that Sec. 294 was enacted. But in Sec. 294 it was carried over only for the 6% interest for delayed payment (Sec. 294(a)(1)) *but not for the “additions” in 294 (d)*. The history of the tax law therefore corroborates the conclusion to be drawn from the section itself: *the “additions” under Sec. 294(d) are not meant to be a tax.*

(2) Contrast Between Language of 1939 Code Sections 293 and 294(d).

The conclusion that the “additions” under Sec. 294 (d) are not a tax *and are not intended to be enforced as a tax*, is further corroborated by contrasting the language of Sec. 293 with that of 294(d).

Sec. 293(a) of the 1939 Code, dealing with negligence penalties, provides that in case of negligence:

“ . . . 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, *collected*, and paid *in the same manner as if it were a deficiency* . . . ”

This approaches the same problem from the other end. The earlier statutes made the substantive provision that such penalties *should be part of the tax*; Section 293 makes the *procedural* provision that the 5% "addition" shall be enforced "in the same manner as if it were a deficiency". This indicates *first* that as a matter of substantive law *the additions are not deficiencies*; *second*, that when Congress intended to make the deficiency procedure apply to such additions, *it did so expressly*.

No such provision is made for the additions in Sec. 294(d). It follows, that Congress did not intend that they should be enforceable in the manner of deficiencies. This corroborates the conclusion which follows from the definition of *deficiency*, which we now set forth.

c. Deficiency Notice Limited to Deficiencies in Tax.

In the 1939 Code deficiency notices are governed by Sec. 272(a) which provides in part:

"If in the case of any taxpayer, the Commissioner determines that there is a deficiency *in respect to the tax* imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail". (Emphasis added.)

Conversely, if the Commissioner does *not* determine a deficiency in respect of the *tax*, he is *not authorized* to send out a deficiency notice. *A deficiency notice is not a legal method for collecting any claim other than those set forth in Sec. 272(a)*.

The same conclusion follows from the language of 1939 Code Sec. 271(a)(1):

“271. *Definition of deficiency.*

(a) *In general.* As used in this chapter in respect of a tax imposed by this chapter, ‘deficiency’ means the amount by which *the tax* imposed by this chapter, exceeds the excess of—

(1) the sum of (A) the amount shown as *the tax* by the taxpayer unop his return, if a return was made by a taxpayer and an amount was *shown as the tax* by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (h) (2), made” . . . (Emphasis, except headings, added.)

For other types of claims, other procedures are provided—generally an action in the U.S. District Court. (Cf. 1939 Code, Secs. 3740-45.)

We are not concerned in this case with the problem which would arise were there both an alleged deficiency in tax and a claim for addition under Sec. 294. In this case there is admittedly no deficiency in the tax itself; what is involved is exclusively the “additions” or “penalties” under Sec. 294(d)(1)(A) and Sec. 294(d)(2). A claim for this alone does not fall within the language of Sec. 272 (a) stating the circumstances under which a deficiency notice is authorized.

d. Answer to Opinion of Tax Court.

The Tax Court (p. 55) mentions this point but does not meet it. Its opinion discusses whether the Tax Court *acquires jurisdiction*—which has never been denied.

Of the authorities which it cites, the most important is *Ely & Walker Drygoods Co. v. U.S.*, 34 Fed. 429, *supra*, which indirectly supports the petitioner.

Of the Tax Court cases, *Herbert Eck*, 16 T.C. 511, arose under Sec. 293—already discussed.

As pointed out, the language of Sec. 293 differs from that of Sec. 294 in exactly this respect; and the fact that *Herbert Eck*, turns on this special language in Sec. 293 is a circumstance supporting petitioner in a case under Sec. 294.

E. C. Newsom, 22 T. C. 225 passed only on the question of whether the Tax Court acquires jurisdiction upon the filing of a petition. However, it goes on to discuss the nature of the “additions” under Sec. 294 (d) citing *Ely & Walker Dry Goods Co. v. U.S.*, 34 F. 2d 429, and *Schneider v. U.S.*, 119 Fed. 215, *overlooking the fact that they arose under earlier, differently worded statutes*, and that the difference in statutory language now turns the point in petitioner’s favor.

Union Tel. Co. v. C.I.R., 51 B.T.A. 152 involves normal tax and undistributed profits tax; it did not involve penalties (“additions”) at all. It turns on the Tax Court’s lack of jurisdiction to review the *determination of an overassessment*.

Charles E. Myers, Jr., 28 T.C. 12, so far as it follows *E. C. Newsom*, 22 T.C. 225, in holding that the Tax Court has jurisdiction, adopts the discussion about the nature of the “additions”, without noticing that the authorities cited do not support it.

2. Deficiency Notice Unavailable Under 1954 Code.

To cover the possibility that availability of a deficiency notice might be considered a procedural matter, governed by current statutes, we point out that on the facts of this case, a deficiency notice was no more available under the 1954 code than under the 1939 code. The authorization for deficiency notices in the 1954 code is found in section 6212(a) which is substantially the same as section 272(a) of the 1939 code:

“6212. *Notice of deficiency.*

(a) *In general*—If the secretary or his delegate determines that there is a deficiency *in respect of any tax* imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by registered mail.” (Emphasis added.)

It is evident from these sections that neither the 1939 nor the 1954 code authorizes the sending of a deficiency notice *solely* for the “additions” to the tax (“penalties”) set forth in 1939 Code Sec. 294.

3. Failure of Deficiency Notice to State Facts Authorizing Sending of Deficiency Notice Requires Judgment for Petitioner.

a. By filing a deficiency notice for the purpose of claiming an “addition” or penalty, the Commissioner

has mistaken his remedy. The deficiency notice filed in this case is without authority and of no legal effect. Since the deficiency notice does not state facts on the strength of which a deficiency may be assessed (1939 Code, Sec. 272 (c)) the ordinary procedure would be to dismiss it. Since, however, neither the 1939 Code (Sec. 1117) nor the Rules of the Tax Court seem to provide for such a decision, the proper judgment is judgment for the petitioner, without prejudice to the pursuit by respondent of any other remedy which may be available. The judgment should be reversed with directions to enter judgment for petitioner without prejudice, etc.

**B. ANY OTHER CONSTRUCTION OF STATUTE WOULD RAISE
SERIOUS CONSTITUTIONAL QUESTIONS.**

1. Statutes are to be construed to avoid serious constitutional questions, if possible.

Ullmann v. U.S., 350 U.S. 422, 433:

“We agree with District Judge Weinfeld’s interpretation of this section: ‘The most that can be said for the legislative history is that it is on the whole inconclusive.’

Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires. Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers. The Supreme Court has repeatedly warned “if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a con-

struction of the statute is fairly possible by which the question may be avoided". Indeed, the Court has stated that words may be strained "in the candid service of avoiding a serious constitutional doubt". Here, there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy to avoid the constitutional questions advanced by the witness. Indeed, to reach the constitutional question would require straining of language. In such circumstances, the court's duty is plainly to avoid the constitutional question.' "

Guessefeldt v. McGrath, 342 U.S. 308, 317-18.

2. To give sections 272(a) and 294(d)(1)(A) and 294(d)(2) any but a literal construction would raise serious constitutional questions.

a. (1) First of all, attempting to enforce the "additions" under Secs. 294(a)(1)(A) and 294(d)(2) by deficiency notice subject only to a trial in the Tax Court, would involve denial of trial by jury. The deficiency notice in this case describes the sums claimed as "penalties". The statutory sections, while saying merely that the sums claimed shall be added to the tax, show clearly that the "additions" are *imposed on the basis of alleged fault*.

There is no trial by jury provided in the legal machinery beginning with the deficiency notice and running through the Tax Court. (For the purpose of the record, a written demand for jury trial was made in the present case (R. 16); it was denied by the Tax Court before trial.) This means that if the deficiency notice procedure is applicable, the govern-

ment would be seeking to enforce *a money claim based on alleged fault* without allowing a trial by jury at any stage. But the VIth Amendment guarantees trial by jury in all criminal cases, and the VIIth Amendment guarantees trial by jury in all civil causes at common law involving more than twenty dollars.

Whether the “additions” be civil or criminal, to enforce them without opportunity for a trial by jury is clearly in violation either of the VIth or of the VIIth Amendment (depending on whether the “additions” are considered civil or criminal). Cf. *U.S. v. Regan*, 232 U.S. 37, 44, quoting from *Hepner v. U.S.*, 213 U.S. 103, 115.

These payments claimed on the basis of fault are, of course, in a different category from a tax. As indicated above, by attempting to make such payments—for fault—“part of the tax”, the provisions of the revenue acts of 1918 and 1921 were wide open to the constitutional objection that they attempted to enforce such payments without opportunity for a jury trial. The literal wording of the 1939 (and 1954) act avoids this difficulty—which may be one of the reasons for the change.

Nor is the situation improved by the alternative of paying the “additions” and suing for a refund in the District Court (assuming that such procedure is available where only an “addition” and no tax is involved).

If this were the only way of getting a jury trial, the right to a jury would be conditioned upon first paying in full the disputed sum claimed for a disputed

alleged fault. Such a condition would place an unconstitutional burden upon the right of trial by jury. The inadequacies and hardships of paying first and suing afterwards are set forth in *Flora v. U.S.*, 357 U.S. 63, 73-4.

Root v. L.S. & M.R.S. Co., 105 U.S. 189, 206:

“... the 7th Amendment forbids any infringement of the right of trial by jury, as fixed by common law.”

Town of Grand Chute v. Winegar, 82 U.S. 373, 375:

“the right to a trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it.”

McKeon v. Central Stamping Co., 264 F. 385, 387-90 (C.C.A. 3).

The English common law never made payment of the claim a prerequisite to a civil defendant's right to a jury trial. At the very least, any such requirement for the additions of Sec. 294 of the 1939 code *would raise serious constitutional questions*.

(2) The Tax Court (R. 56) dismisses this argument by citing *Erwin v. Granquist*, 253 F. 2d 26, and *Wickwire v. Reinecke*, 275 U.S. 101.

The first of these held only that, as a matter of substantive law, the XVIth Amendment authorizes the laying of estimated taxes.

Wickwire v. Reinecke, 275 U.S. 101, dealt with proceedings to *determine the amount of a tax*; not with

an adjudication of fault. Besides, the holding was in favor of the taxpayer.

b. (1) *Second*, Rule 32 of the Tax Court puts the burden of proof on the petitioner. There is authority that this cannot be done, even in the enforcement of a civil liability based upon fault. *Western & Atl. Ry. v. Henderson*, 279 U.S. 639. The same rule in criminal cases: *Tot v. U.S.*, 319 U.S. 463; *Manley v. Georgia*, 279 U.S. 1. While certain forms of the reversed burden of proof have been sustained (*Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35, distinguished in *W. & A.R.R. v. Henderson*, 279 U.S. 639, 643) the serious Constitutional question would remain. The statute must be construed to avoid it.

(2) The foregoing difficulty is aggravated by the fact that in assessing "additions" under 1939 Code Sec. 294(d) the Commissioner acts in the *dual capacity* of the executive officer bearing the responsibility of finding and collecting revenue, and a quasi-judge who has to make a judicial finding of fault. Many cases have held such double functions violative of due process of law. The point was raised before the United States Supreme Court but not decided in the case of *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749. In that case the same official, acting as both judge and mayor, imposed fines for violations of the prohibition law. The defense claimed due process was violated both because of the conflict of official duties, and because of a personal conflict, the judge-mayor's salary being paid out of the fines imposed. The conviction was reversed upon the latter ground; the

question of incompatibility of official duties was not reached. It comes up in the present case, however. The argument of counsel is given in condensed form 71 L. Ed. 749, 750, as follows:

Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 750:

(Argument of Counsel) "The mayor who tried the instant case, was financially interested in his decision as executive head of the village and was operating his court as a commercial proposition for the purpose of making money for his village."

Of the cases cited in support of this proposition, the following are especially in point:

Pearce Atwood (1816), 13 Mass. 324, 340-41 (violation of Sunday laws; judge, taxpayer of town to whose special benefit fines accrued, held disqualified);

Nettleton's Appeal (1859), 28 Conn. 268 (judge, one of selectmen of town, having duty to administer property of incompetents, held disqualified to pass on application to appoint conservator for property of incompetent); the Court said (p. 271):

"Selectmen are, for most purposes, the agents of the town and the guardians of its treasury, appointed (in the language of an ancient statute) 'to take care of and order its prudential affairs' as well as to inspect the conduct and management of all persons residing in it, with an especial reference to the protection of the town against liability for the maintenance of persons reduced to want.

"... —It would be shocking to all our notions in regard to judicial dignity, impartiality and de-

corum, to witness, in the same person, at the same time, the exercise of functions so incongruous and incompatible.”

In the case at bar, *every finding of “willful neglect”* which the Commissioner makes *brings in added revenue*, and makes it less pressing for him to find revenue elsewhere. (1939 Code, 26 USC 3600; 1954 Code, 26 USC 7601.) The Commissioner and his deputies would thus be exposed to the temptation not only to collect revenue, but to create it. The same factors come into play which have been noted in cases of coerced confessions. As the United States Supreme Court said in *McNabb v. U.S.*, 318 U.S. 332, 87 L. Ed. 819 (pp. 344-826 n. 8):

“‘. . . An experienced civil officer observed, “There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes, than to go about in the sun hunting up evidence.” This was a new view to me, but I have no doubt of its truth’. Sir Fitzjames Stephen, *A History of the Criminal Law of England* (1883) vol. 1, p. 442, note . . .”

So it is far easier to make charges of fault and then offer to compromise them than to go to work canvassing for legitimate sources of revenue.

It is true that in making claims based on fraud, the Commissioner makes a preliminary finding of fault. But such cases go into the Tax Court with the burden of proof on the Commissioner. (1954 Code, 26 USC 7454—we cite the 1954 Code, here as on a procedural

point.) As to the “additions” under Sec. 294(d) on the other hand, if the Commissioner’s contentions be accepted, *the Commissioner acting in a dual capacity, makes a finding of fault, and then goes into the Tax Court with a presumption in his favor and the burden of proof on the taxpayer.* (Rule 32.)

All of these difficulties are avoided by simply taking the literal meaning of the statute, and holding the deficiency notice procedure inapplicable to the “additions” under Sec. 294(d) at least where the latter stand alone.

c. *Third.* Where payments claimed on the basis of alleged fault are the only thing involved, if the deficiency notice is treated as a determination rather than merely an accusation, it becomes an *ex parte*, executive determination of fault. If the “additions” claimed are criminal penalties, the deficiency notice would be an executive determination of guilt. Legislative determinations of guilt are explicitly forbidden as bills of attainder. (Const. Art. I, Sec. 9, cl. 3, this prohibition is not limited to strictly criminal cases, *U.S. v. Lovett*, 328 U.S. 303.) An *ex parte* executive determination either of guilt or of civil fault, would certainly be a denial of due process under the Vth Amendment. Even without attempting to decide the questions, the *serious constitutional issue* is evident.

d. The unconstitutionality of Tax Court Rule 32 as applied was raised before the Tax Court (R. 15, 22) and was *completely ignored by it.* (R. 56, 58.)

C. SUMMARY.

The literal meaning of the words used in the 1939 Act makes a deficiency notice inapplicable where the only claim is for the "additions" ("penalties") under Sec. 294 of that act. Serious constitutional questions would arise if the act were given any other construction.

Under these circumstances the correct interpretation is that the present claim is not one which may be enforced by a deficiency notice. The deficiency notice does not state facts which can be made the basis of liability in such a proceeding. Judgment should be reversed with direction to enter decision for the petitioner without prejudice to the pursuit by respondent of any other remedy which may be available. If this contention is sustained, it disposes of the case and other phases need not be considered.

II. TAX COURT ERRS AS MATTER OF LAW (AND FACT) IN HOLDING NON-FILING NOT DUE TO REASONABLE CAUSE.

The argument in this part of the brief is covered by the following points in the petition:

(R. 64) "(3) that under the authorities 'wilful neglect' requires a 'bad purpose'; that upon the present record as a matter of law no 'wilful neglect' is shown in the non-filing of estimated tax returns in the two final years of an eight-year period; that the Tax Court's finding to the contrary was unsupported by evidence and capricious; that its legal conclusion to the contrary was not supported by its own findings of

probative facts and therefore capricious. (*Helms Bakeries v. C.I.R.*, 236 F. 2d 3.)

(R. 67) “3. The evidence, as a matter of law, does not show wilful neglect, but on the contrary shows reasonable cause for non-filing of estimated tax returns for the years 1952 and 1953, and the Tax Court’s finding to the contrary is arbitrary and capricious.

In this connection the following finding of the Tax Court shows a misreading of the testimony:

‘In preparing his returns on Form 1040, petitioner used the instruction pamphlet, which usually accompanied the form, as a reference book where a reference to the instructions appeared on the face of Form 1040.’

The testimony is that reference to the instructions pamphlet was made whenever Form 1040 seemed to require further elucidation, not merely when Form 1040 referred to the instructions pamphlet. Besides, the instructions pamphlet always (not ‘usually’) accompanied Form 1040.

“4. The Tax Court’s legal conclusion of ‘wilful neglect’ and failure to show reasonable cause is unsupported by its findings of probative facts.”

Section 294(d)(1)(A) provides for “additions” to the tax for non-filing of estimated returns “unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect”.

“Reasonable cause” and “willful neglect” are here set forth as opposites. In short, the statute penalizes

“willful neglect”—and “reasonable cause” is anything which negatives “willful neglect”.

This construction is indicated by the recent Fifth Circuit decision in *Patchen v. Com'r*, 258 F. 2d 544, 552, holding that it was the intent of the statute to penalize willful failure to file estimated returns.

A. FACTS.

In addition to facts already set forth in the general statement of facts, it was found that “petitioner used the instruction pamphlet which usually accompanied the form, as a reference book . . .” (R. 54.) The finding continues by saying, “where a reference to the instructions appeared on the face of Form 1040”. This last is an evident misreading of the testimony, which was that the instructions pamphlet was consulted whenever something in Form 1040 seemed to require explanation:

(R. 34) “. . . That is, whenever anything seemed to require explanation on the face of Form 1040, I went to the reference pamphlet.”

(Of course, the instructions pamphlet *always* accompanied Form 1040, not merely “usually”, as the Tax Court says in its opinion.) The successive references to filing of an estimated return, appearing over the years in Form 1040 itself, are set forth in the appendix to this brief.

Thus the basic facts (found by the Tax Court itself, except for the above modification as to the use made of the instructions pamphlets) are as follows:

The instructions pamphlets for 1948 and 1949 *did not require the filing of both forms* (i.e., Form 1040 and the estimated tax return). This requirement was introduced in a press release issued March 13, 1950, and in the instructions pamphlet *for 1950* (issued 1951). The 1950 instructions pamphlet states the requirement, not conspicuously as an innovation, but *in ordinary type in the middle of a paragraph on page 12*.

Throughout the years 1944-1953 petitioner's Forms 1040 always showed on their face that no estimated tax return had been filed, but the Commissioner never objected to this procedure *until 1955* when he made the present claim of "willful neglect" for non-filing for the years 1952 and 1953—*the last two years of a nine-year period*. There is no documentary evidence as to the instructions pamphlets for years *before 1948*. (In a subsequent section we discuss the question of laches arising from the government's destruction of these records.)

But there are only two possibilities with respect to these earlier instructions pamphlets—*either they stated that both forms had to be filed or they did not so state*.

1. If we first consider the view *contrary* to the petitioner's testimony, that the forms before 1948 so stated, then the forms followed a vacillating pattern; those of 1943-47 would have had the requirement, those of 1948 and 1949 did not, those of 1950 and after *restored* the requirement. *And all this without any change in the statute*.

If this is what happened, then the Commissioner was clearly vacillating, and *obviously was uncertain as to the true meaning of the statute.*

Any corresponding uncertainty of a private citizen would not be "willful neglect" under any normal meaning of the term (we discuss the legal significance, *infra*). This conclusion would be emphasized by the fact that the Commissioner *raised no objection whatever over a period of nine years.*

2. On the other hand, if, as petitioner testified (R. 43) none of the instructions pamphlets *before* that of 1950 required that both forms be filed, then the requirement in the 1950 pamphlet and after, was an *innovation*. Since (in this view) no such requirement had been made for the years 1943-1949 there are again only two possibilities: *either* the Commissioner forgot the point for seven years, *or* the Commissioner changed his administrative interpretation.

The press release of March 13, 1950 (Ex. 2, R. 46-48) takes the position that the requirement of filing both petitions was always in force. On its face, this is inconsistent with the contents of the instructions pamphlets, which were changed in this respect for 1950 (the 1950 pamphlet issued 1951). But the position taken in the press release undoubtedly determined the course which followed.

Having said that the requirement of both forms was nothing new, the Commissioner made no change whatsoever on the face of Form 1040, and *did not make the new requirement conspicuous as an innovation when it was first included in the 1950 pamphlet.*

Instead, with nothing on Form 1040 to indicate a change, the new requirement was tucked away obscurely in the 1950 and subsequent pamphlets. *There was the greatest possible opportunity to miss it.* Petitioner's overlooking it (contributed to by the way in which the various forms dealt with the point) may have been an oversight—it certainly was not willful neglect.

We now consider the rules of law which are relevant to the above conclusion. They are, that “willful neglect” imports a “bad purpose” and does not cover a simple omission; that officers of the government are presumed to know what they are doing, and that the acts of even minor officials are relevant in determining whether a private individual has been guilty of willful neglect.

We discuss these three points, but shall take the procedural ones first, and the substantive definition of “willful neglect” afterwards.

B. OFFICIAL ACTS ARE PRESUMED TO BE REGULARLY DONE AND OFFICIALS PRESUMED TO KNOW WHAT THEY ARE DOING.

Although it is found that over a nine-year period, petitioner's 1040 forms always showed on their face that no estimated tax return had been filed, the Tax Court holds:

(R. 57-8) “Petitioner could not rely upon the failure of the revenue service to call this omission to his attention. . . . Any reasonable and prudent person would not rely upon an impression, but would consult the current law.”

If the Commissioner had in fact changed his administrative interpretation, his earlier lack of objection would not have been any "failure" but would have been *the execution of the earlier interpretation*. Since the instructions pamphlets varied upon the identical questions, it is not clear what the Tax Court means by "current law". Consulting the *statute* would have led nowhere, since the Commissioner's own application of the statute was not uniform.

The Commissioner's position apparently is that the variations were themselves the result of an oversight, and that a private individual has no right to assume that the Commissioner's acts were intentional or done with knowledge of the facts. In addition, before the Tax Court, the Commissioner made the rather startling argument that the long absence of objection could not be considered as any approval of the method used, *because it was not shown that the Commissioner (or any deputy) had read the returns. (!)*

The answer to both of these propositions is that official acts are presumed to be regularly done; this presumption includes the presumption that governmental officers *have acted with knowledge of the relevant facts*. So, if the Courts act upon that presumption, it cannot be willful neglect for a private citizen to do so.

For the presumption that official acts are regularly performed, see the following cases:

U.S. v. Chemical Foundation (1926), 272 U.S. 1:

(pp. 14-15) "The presumption of regularity supports the official acts of public officers and, in the

absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties (cases). Under that presumption, *it will be taken that Mr. Polk acted upon knowledge of the material facts.*" (Italics added.)

Pan American Petroleum Co. v. U.S. (1927), 273 U.S. 456:

(p. 498) "Under the Act of June 4, 1920, it was his official duty to administer the oil reserves; he was not called as a witness, and it is not to be assumed that he was without knowledge of the disposition to be made of them or of the means employed to get storage facilities and fuel oil for the Navy. He is presumed to have had knowledge of what he signed; . . ."

Bank of U.S. v. Dandridge (1827), 25 U.S. 64, 69-70:

" . . . The law . . . It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia preasumuntur rite et solemniter esse acta, donec probetur in contrarium*. Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; . . ."

Osborne v. Bank of U.S. (1824), 22 U.S. 738, 830 (the Court does not investigate to find out whether attorneys appearing before it really represent their respective clients, but assumes that official acts are being regularly performed).

Under these authorities the Courts presume that officials act regularly and with knowledge of what they are doing; they *could* but they *do not* make an investigation to check whether attorneys purporting to represent a client really do so.

The present case is merely one of a private citizen who has acted upon the same presumption.

First, there is the presumption that the Commissioner or his deputies are familiar with the obvious contents of the returns in their office,—*second*, there is the presumption that where no objection is made for some nine years, this is because the returns were in the proper form. The mere fact that additional investigation *could have* been made, does not, of itself, mean that there was any occasion for it.

It certainly cannot be "willful neglect" for a private citizen to act upon the same presumption which the Courts follow as a matter of law.

C. ACTS EVEN OF MINOR OFFICIALS ARE RELEVANT IN DETERMINING "WILLFUL NEGLIGENCE" OF PRIVATE CITIZEN.

Before the Tax Court it was suggested, though not directly argued, that, in determining "reasonable cause" vs. "willful neglect" the Court could consider all facts except the acts of the Commissioner's deputies themselves.

But the United States Supreme Court is directly to the contrary. Acts and declarations even of minor officials are relevant in deciding whether there has been "willful neglect" or "reasonable cause". This is clear from the decision in *Heikinnen v. U.S.*, 355 U.S.

273, as well as from the earlier one of *Hessman v. Campbell*, 134 F.S. 416.

Heikinnen v. U.S., 355 U.S. 273, was an immigration case, but it was based on two tax cases. One of these was *U.S. v. Murdock*, 290 U.S. 389, which in turn is based on *Felton v. U.S.*, 96 U.S. 699, a civil action for a penalty under the internal revenue laws. In *Heikinnen v. U.S.*, the Supreme Court held the evidence of "willful failure" *insufficient as a matter of law*—largely on the basis of statements of minor officers:

(pp. 276-7) "The Government argues that petitioner willfully failed to make timely application to Finland, or to some other country to receive him, and that if he had done so he might have been able to identify, within the time prescribed, a country to which he could go."

(p. 279) "There can be no *willful* failure by a deportee, in the sense of § 20(c) to apply to and identify a country willing to receive him in the absence of evidence, or an inference permissible under the statute, of a 'bad purpose' or '(non-)' justifiable excuse; or the like. Cf. *United States v. Murdock*, 290 U.S. 389, 394; *Spies v. United States*, 317 U.S. 492, 497, 498. Inspector Maki had informed petitioner that his purpose, in procuring the 'passport data' on April 9, 1952, was to send it to the District Director at Chicago, where it 'would be considered . . . with a view towards . . . obtaining some travel document or other in this case'. Moreover, the letter of April 30, 1952, from the officer in charge of the Duluth office, told petitioner, in the plainest language, that the service was making the arrangements to

effect his deportation and, when completed, he would be notified when and where to present himself for deportation. Surely petitioner was justified in relying upon the plain meaning of those simple words, and it cannot be said that he acted 'willfully'—i.e., with a 'bad purpose' or without 'justifiable excuse'—in doing so, until at least, they were in some way countermanded, which was never done within the prescribed period." (Court's italics.)

To the same effect is *Hessman v. Campbell*, 134 F.S. 416, 418, a tax case.

So in the present case, it was relevant to the issue of "reasonable cause" vs. "willful neglect" that (1) the instructions pamphlets before 1950 did not require the filing of both forms; (2) no change occurred in Form 1040; (3) the change in the 1950 pamphlet was obscure, on an inside page; (4) the Commissioner made no objection to the method used for a period of some nine years.

D. "WILLFUL NEGLECT" REQUIRES "BAD PURPOSE".

The foregoing quotation from *Heikinnen v. U.S.*, 355 U.S. 273, 279, includes the formula that "willful failure" requires a "bad purpose". It is necessary only to add the original language from *Felton v. U.S.*, 96 U.S. 699, 702:

"Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it, or to omit to do it. 'The word "willfully"', says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely

“voluntarily”, but with a bad purpose.’ *Com. v. Kneeland*, 20 Pick. 220. ‘It is frequently understood’, says Bishop, ‘as signifying an evil intent without justifiable excuse.’ ”

In *Felton v. U.S.*, 96 U.S. 699, the petitioner was in a less favorable position than here. Felton had acted *squarely contrary to the directions of the tax officials*, instead of following their implied directions.

The counterpart to the rule that “willful neglect” requires a bad purpose is that “reasonable cause” requires no more than ordinary business prudence. (*Hatfried Inc. v. C.I.R.*, 162 F. 2d 628, 635; *Orient Inv. & Fin. Co. v. C.I.R.*, 166 F. 2d 601, 603-4; *In re Fisk’s Estate*, 203 F. 2d 358, 359.) The Tax Court brushed this argument aside. (R. 57.) But we have already shown that the presumption that public officers have regularly performed their duties *with knowledge of material facts*, is a presumption which the Courts follow as a matter of law. This is certainly not *less* than “ordinary business prudence” in private affairs.

E. ALTERNATIVELY CLEAR ERROR IN FACT.

We believe that under the foregoing authorities the finding of “willful neglect” is erroneous as a matter of law. If not, it is “clearly erroneous” as a matter of fact. On this theory, too, the judgment of the Tax Court would have to be reversed. (*Helms Bakeries v. C.I.R.*, 236 F. 2d 3, 9.)

III. TAX COURT UNCONSTITUTIONALLY PUT BURDEN OF PROOF ON PETITIONER.

This argument is covered by the following points in the petition:

R. 64) “(4) that, in any event, petitioner was denied due process of law in violation of the Vth Amendment to the United States Constitution in that the Tax Court measured the evidence on the present claim according to the inverted burden of proof provided for in Tax Court Rule 32.”

It is also included in par. “2” on R. 66-7, already quoted, in connection with subdivision “I” of this brief.

Since the Tax Court refused to accept the contention that the deficiency-notice procedure does not apply to simple claims for the “additions” under Sec. 294(d), it was faced with the question whether it could constitutionally apply the inverted burden of proof of Tax Court Rule 32.

We have already presented the argument on this point as an aid to the statutory construction of 1939 Code Secs. 271, 272, 294(d). (Subdivision I-B of this brief, *supra*.) If this statutory construction is rejected, then the unconstitutionality of the inverted burden of proof as applied to *an adjudication of fault* (as distinguished from a determination of the amount of a tax) becomes an independent issue. This issue is one which was carefully framed in the Tax Court, and which the Tax Court blandly ignored. The Tax Court cites two cases involving determination of

the *amount of tax*, not adjudication of fault. (R. 56, citing *Wickwire v. Reinecke*, 275 U.S. 101, and *Welch v. Helvering*, 290 U.S. 111.) Without other or further discussion, it measures the evidence from the premise that petitioner had the burden of proof. (R. 56, 58.) Since the inverted burden of proof is a denial of due process in an adjudication of fault, the judgment must be reversed on this ground in any event. This point is especially important since the Tax Court made findings:

(R. 54) "Petitioner was unable to recall how he found out how to use and compute his income under section 107, but thought he got such information from conversations with other attorneys who were familiar with such section"

and again:

(R. 57) "Petitioner could not recall where he gained such impression [as to change in requirements]"

This relates to matters occurring 11 and 12 or 13 years before the trial. (The trial took place on October 3, 1957, R. 18; the first application of Sec. 107 was in 1946, R. 54; the year in which petitioner thought the requirements were changed was 1944, or 1945, R. 42, 53.) It is at least inferrable that the Tax Court considers these lacunae in recollection as evidence of neglect.

But the issue is, what actually happened, not what is remembered or forgotten from 11 to 13 years later. *If gaps in recollection are thought important, then the burden of proof becomes crucial.*

IV. COMMISSIONER'S PROCEEDING BARRED BY LACHES— DENIAL OF DUE PROCESS OF LAW.

The point that the Commissioner's proceeding is barred by laches amounting to denial of due process of law is covered by the following points in the petition:

(R. 65) "(6) that the Forms 1040 and accompanying instructions pamphlets for years preceding 1952 are relevant to the issue of 'good cause' versus 'willful neglect'; that after having destroyed these documents as too old, the respondent denied due process of law to petitioner in violation of the Vth Amendment to the United States Constitution in pressing a claim on which it had destroyed relevant evidence; that for the same reasons respondent was guilty of laches which upon these facts operates against the government."

(R. 67-8) "6. The government having heretofore destroyed as too old, evidence which is relevant to the issues of this case deprives petitioner of due process of law by now pressing the claim; for which reason the government is barred by laches."

The Commissioner's office destroyed records antedating the statute of limitations. Petitioner attempted to get them but was told they had been destroyed. (Exhibit 10, R. 49-51.) The instructions pamphlet for 1948 was the earliest of these documents which either side was able to produce.

The instructions pamphlets for 1948 and 1949 showed that *in 1950 the Commissioner changed his instructions regarding the necessity of filing both*

Form 1040 and the estimated return. This was true although the Commissioner denied it. (Ex. 2, R. 46-48.)

The petitioner testified that he was informed that a similar change had taken place about 1944. (R. 33, 43.)

The Commissioner and the Tax Court take the position that this did not happen, and was merely an "impression" based on "rumor", which constituted mere "ignorance of the law". (R. 24, 57, 58.)

But just as much as the 1948-50 forms showed that (contrary to the Commissioner's contentions) the Commissioner had changed his instructions at that time, production of the 1943-1945 records may very well have shown that the practice had likewise been changed at this earlier period.

If so, petitioner would be shown to have acted not on "impression", "rumor" or in "ignorance of the law", but to have acted *according to the law as the Commissioner then administratively interpreted it*. Respondent, having itself destroyed the records, now claims a penalty based upon total discounting of petitioner's testimony that it had been announced in 1944 that filing of estimated tax returns was optional. The records themselves would tend to show whether that was true or not—just as the records immediately before and after 1950 tend to corroborate the point.

Due process of law encompasses the "traditional notions of fair play and substantial justice." (*Milliken v. Meyer*, 311 U.S. 457, 463; see also *Galvan v.*

Press, 347 U.S. 522, 530; *McDonald v. Mabee*, 243 U.S. 90, 91; *Holden v. Hardy*, 169 U.S. 366, 389.)

It is certainly not in accord with any "traditional notions of fair play and substantial justice" to permit a party to prosecute a claim after that same party has destroyed relevant evidence. This is all the more true where the relevant evidence has been destroyed because of lapse of time.

On the part of a private litigant such conduct would constitute laches. (Cf. *Whitney v. Fox*, 166 U.S. 637, 648; *Mackall v. Casilear*, 137 U.S. 556, 566; *Foster v. Mansfield C. & Lake M. R. Co.*, 146 U.S. 88, 100, all dealing with loss or destruction of evidence.) On the part of the government it is a kind of laches which the constitution enforces against the government. (Amendment V, U.S. Constitution, and cases cited *supra* on fundamentals of due process.)

(In criminal cases, lapse of time coupled with loss of evidence bars the government under the VIth Amendment independently of any statute of limitations. *U.S. v. Provo*, 17 F.R.D. 183, 194, 203; *aff'd*, 350 U.S. 357. The constitutional provision in effect raises laches against the government.)

The Tax Court cites *U.S. v. Summerlin*, 310 U.S. 414, 416, as holding that the government is not subject to laches. But there the defense of laches did not also raise a constitutional issue. Laches as such may not run against the government; but it does so to the extent that is needed to satisfy requirements of due process of law.

V. THE TAX COURT ERRED IN FINDING SUBSTANTIAL UNDERESTIMATION AND ASSESSING DOUBLE PENALTIES.

The argument in this part of the brief is covered by the following points in the petition:

(R. 64-5) "5. The provisions of section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all and section 294(d)(2) does not apply at all to the non-filing of an estimated tax return."

(R. 67) "5. The provisions of Section 294(d)(2) of the 1939 Code are not cumulative to those of section 294(d)(1)(A) and do not apply to the present case at all."

A. NO SUBSTANTIAL UNDERESTIMATION WHERE REASONABLE CAUSE FOR NON-FILING.

"Substantial underestimation" connotes an affirmative act, and contains at least a suggestion of fraud. Whatever may be the situation where there is no reasonable cause for non-filing, there certainly cannot be said to be a "substantial underestimation" where there is good cause for the non-filing. Not even *Fuller v. Commissioner*, 20 TC 308, holds to the contrary.

Needless to say "substantial underestimation" does not, in the ordinary significance of words, mean an omission divorced from any affirmative act—i.e., simple non-filing. Nor is any such definition contained in the section giving special definitions for purposes of the 1939 Act—i.e., Sec. 22, and to a certain extent also Secs. 11 and 12.

Greater details together with authorities on this point will be given in the next section when we dis-

cuss the Commissioner's claim that section 294 gives cumulative remedies.

In short, when good cause is shown for non-filing, Sec. 294(d)(2) does not come into play at all. The penalty claimed for "substantial underestimation" falls along with the penalty claimed for non-filing.

B. SECTION 294 DOES NOT PROVIDE FOR DOUBLE PENALTIES.

The commissioner claims that where no estimated tax return is filed he can (in the absence of reasonable cause) impose two penalties for the same act: that where the statute has expressly imposed one penalty for non-filing, another penalty, imposed in terms for "substantial underestimation" also includes non-filing.

The Tax Court has assessed cumulative penalties under both Secs. 294(d)(1)(A) and 294(d)(2). Since petitioner denies "willful neglect" as a matter of law, two distinct questions arise.

If petitioner is sustained on objections to the charge of "willful neglect", then the question is whether an "addition" under Sec. 294(d)(2) *can stand alone*. (There are no authorities on this point.) This is the question discussed in subdivision "A", *supra*.

If, on the other hand, the first part of the appeal is not sustained, then there is the question whether Sec. 294(d) authorizes cumulative penalties for the same omission.

Since the decision of the Tax Court there have been three Court of Appeals decisions: *Acker v. C.I.R.*, 258 F. 2d 568 (cert. granted Jan. 19, 1959, 27 L.W. 3207);

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5); and *Hansen v. C.I.R.*, 259 F. 2d 585.

Of these the *Acker* case held against the double penalty; the *Patchen* and *Hansen* decisions upheld it.

Before discussing these cases, we shall make an independent analysis of the statute (none of the three opinions makes the analysis which follows).

1. General Principles of Construction.

a. On its face, Sec. 294 uses the phrases "failure to file" and "substantial underestimation" separately and with separate meanings. Since they are used separately in different subsections, they are assumed to be used in different senses. A statute is to be construed to give meaning to every one of its terms. (*U.S. v. Menasche*, 348 U.S. 528, 538; *Platt v. Union P.R. Co.*, 99 U.S. 48, 58-9.)

This view is reinforced by Sec. 22 of the 1939 act, which gives a list of special definitions. The ordinary meaning of "substantial underestimation" certainly is not a mere passive omission; but statutes can and sometimes do incorporate special definitions of terms which they use. *But section 22 contains no special definition* of the phrase "substantial underestimation". This corroborates the *prima facie* interpretation: "failure to file" and "substantial underestimation" have distinct meanings in section 294 and do not overlap.

b. *Fuller v. C.I.R.*, 20 T.C. 308, quotes a Congressional conference report to the effect that where no

estimated tax return is filed, the estimate will be taken to have been zero for purposes of Sec. 294(d)(2). (There is also a treasury regulation to the same effect, but, of course, the regulation cannot supply anything which is not in the statute. *U.S. v. Calamaro*, 354 U.S. 351, 358-9, 1 L. Ed. (2d) 1394, 1399-1400.)

The trouble with this item from the conference report is that it goes contrary to the ordinary meaning of the language of the statute in its final form. Where a statute has a well-defined meaning within its four corners, resort cannot be had to legislative committee reports to *contradict* that meaning.

Bate Refrigerating Co. v. Sulzberger, 157 U.S. 41-46.

Helvering v. City Bank F.T. Co., 296 U.S. 85, 89:

“We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used.”

McKenzie v. Hare, 239 U.S. 299, 308:

“Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been give more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.”

U.S. v. Shreveport Grain & C. Co., 287 U.S. 77, 83:

“In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. *They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.*” (Emphasis added.)

U.S. v. Mo. Pac. Ry., 278 U.S. 269, 278:

“When doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative interest. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended *and in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.*” (Emphasis added.)

Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356:

“Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but the words of the act are plain, and their meaning is apparent, without the necessity of resorting to the extraneous and often unsatisfactory aid of such reports.”

Penn. Ry. v. Int. Coal Mine Co., 230 U.S. 184, 199:

“But while they may be looked at to explain doubtful expressions, not even formal reports . . .

can be resorted to for the purpose of construing a statute contrary to its plain meaning, or to make identical that which is radically different.”

Caminetti v. U.S., 242 U.S. 470.

From these authorities it is clear (1) that the Conference committee report cannot be used to “construe” section 294 of the 1939 act, since (2) the section both on its face and in conjunction with section 22, shows that “failure to file” and “substantial underestimation” are two different things, and the act does not impose the penalties for both on one alone. Here, where non-filing is claimed, it was error also to impose a penalty for supposed “substantial underestimation.”

2. Decided cases.

None of the decided cases considers either the effect of the list of special definitions conformed in Sec. 22, nor the principle that outside aids to construction are impermissible except in case of ambiguity. Nor does any of the three cases consider the effect of *U.S. v. Calamaro*, 354 U.S. 351. Even with these limitations, the Sixth Circuit held the provisions not cumulative. (*Acker v. C.I.R.*, 258 F. 2d 568.)

Hansen v. C.I.R., 258 F. 2d 585, was a decision of the Ninth Circuit, before Judges Pope, Barnes, Hamley. The opinion is written by Judge Barnes. With all due respect to the learned panel, this opinion bases its holdings upon wholly unsound considerations.

The *first* is the same conference report used in the *Fuller* case, *supra*. We have already shown that the

statute has a definitely ascertainable meaning within its four corners, in which event no resort may be had to conference reports to change that meaning.

Secondly, the panel points to the circumstance that the 1954 Internal Revenue Act explicitly makes the two sections *non* cumulative. This is thought to show that the 1939 act must have been cumulative.

But that indicates a failure to think the problem through.

The 1954 act cannot give the 1939 act any different meaning from what the 1939 act had when it was passed. The later act is at best an extrinsic aid to construction. It may be used under the same circumstances and to the same extent as any other extrinsic aid to construction. That is to say, it may be used, if at all, to clear up an ambiguity where the meaning of the statute cannot be determined from its four corners. But, as we have already seen, Sec. 294(d) taken together with Sec. 22, has a definitely ascertainable meaning within its four corners. (As also already noted, Sec. 22 is overlooked by all the opinions.) Since Sec. 294(d) has a definitely ascertainable meaning, extrinsic aids to construction are inadmissible. This includes the subsequent statute. (The 1954 amendment showed merely that Congress disapproved the Commissioner's administration of the 1939 Act.)

Patchen v. C.I.R., 258 F. 2d 544 (C.A. 5), likewise makes an incomplete analysis. Pointing out that willful underestimation is penalized regardless of excuse, while non-filing is excused by reasonable cause, it says:

(p. 552) “This imports that this is expected to be an additional sanction for those who without justification, fail to file a declaration or pay.”

This wholly overlooks the aspect that under this construction, Sec. 294(d) may be held to impose an independent penalty *even where the non-filing is found to be excused by reasonable cause*. Conversely, it means that Sec. 294(d)(1)(A) *could never stand alone*—which runs counter to the framework of the section, which makes 294(d)(1)(A) a subdivision of 294(d)(1) and not a subdivision of 294(d)(2).

The *Patchen* opinion also says:

(p. 552) “And more important, it might have recognized that those whose willful non-excusable acts prevented the effective operation of the scheme of self-assessment and current payment, ought to bear some additional disadvantage over the person whose arithmetic or prognostication was merely faulty.”

This we submit misconstrues 294(d)(2) and again incompletely considers 294(d)(1)(A).

The above passage misconstrues 294(d)(2) because the ordinary meaning of “underestimation” is not an arithmetical error. Again, under the ordinary meaning of the terms, the requirement that the underestimation be “substantial”, eliminates the cases where the prognostication is “merely” faulty.

The above passage incompletely considers 294(d)(1)(A) because it does not even discuss the situation where non-filing is held *excusable*, but where (under

the Commissioner's contention) a penalty would nonetheless be exacted under 294(d)(2) which does not mention non-filing at all.

3. Summary.

The ordinary meaning of the language of Secs. 294(d)(1)(A) and 294(d)(2) coupled with the special definitions given in section 22, shows that sections 294(d)(1)(A) and 294(d)(2) are meant to apply to distinct situations, and are not intended to overlap. Since they do not overlap, they cannot be applied cumulatively to the same act or omission.

VI. AT MOST COMMISSIONER CAN RECOVER ONLY \$48.97.

The point that \$48.97 is the maximum recovery if any at all is possible is presented at the following part of the petition: (R. 65) "(7) that respondent cannot consistently with due process of law under the Vth Amendment to the United States Constitution, increase its claim by its own delay, and it is limited at most to the amount which it could have recovered if it had acted immediately, to-wit, \$48.97."

(R. 68) "7. The government cannot, consistently with due process increase its claim by its own delay; hence it is at most limited to what it might have recovered, if it had acted promptly, to-wit, \$48.97."

The Commissioner did not oppose this contention in the Tax Court. The Tax Court ignored it.

Petitioner's returns previous to 1949 were no longer in existence, which fact is part of the defense of

laches. (Ex. 4, R. 36.) If, however, the matter of laches be disregarded, the Commissioner cannot recover more than he could have gotten had he acted promptly. Since the earliest year of which there is any record is 1949, the most which the Commissioner may recover is what he could have recovered had he made the claim for the year 1949. And, in accordance with what has already been said in subdivision V, *supra*, this is only what might have been recovered under Sec. 294(d)(1)(A).

The reason why the government is limited to what it might have recovered had it made its claim in 1949 is that *it cannot profit by its own delay*. Had a demand for filing estimated tax returns been made, they would, of course, have been filed in succeeding years. The only year for which a penalty could possibly have been collected would have been the first year for which the demand was made. There would have been occasion neither for claiming penalties *for more years than one*, nor for any subsequent *higher year than 1949!*

This is so because, for the government to profit by its own delay, is taking property without due process of law. Due process of law includes, among other things, the elementary rules of fair play; it has long been held an elementary principle of fairness that a claimant cannot increase the amount of his claim by his own acts or delay.

The amount which could be claimed under Sec. 294 (d)(1)(A) on petitioner's 1949 income is \$48.97. (See Exhibit 4, R. 36, which includes the petitioner's 1949 return.)

Authorities holding (A) that due process comprises elementary rules of fairness and (B) that it is an elementary rule of fairness that a claimant cannot increase the amount of his claim by his own acts of delay are as follows:

**A. FUNDAMENTAL JUSTICE AND FAIRPLAY
PART OF DUE PROCESS.**

The fundamentals of justice and fairplay are part of due process. Compare the following cases:

Milliken v. Meyer, 311 U.S. 457, 463:

“The traditional notions of fairplay and substantial justice implicit in due process . . .”

Galvan v. Press, 347 U.S. 522, 530:

“fairplay—which is the essence of due process”.

McDonald v. Mabee, 243 U.S. 90, 91:

“Subject to its conception of sovereignty, even the common law required a judgment not to be contrary to natural justice.”

Holden v. Hardy, 169 U.S. 366, 389.

**B. FUNDAMENTAL PRINCIPLE THAT CLAIMANT CANNOT
ENHANCE AMOUNT OF OWN CLAIM.**

The fundamental nature of the rule that the plaintiff cannot run up his own damages is expressed in the following cases:

Ed. S. Michelson Inc. v. Nebraska T&R Co., 63 F. 2d 597, 601 (CCA 8):

“Such damages, unless punitive in character, are confined to compensation and the law does not contemplate that the party recovering for breach of a contract should be better off because of the

breach than he would have been had the contract been carried out according to its terms. Defendants market on resale was not dependent upon the market price, but was a price fixed by contract and *it would be against all justice to permit it to make a profit by the breach of this contract*, to be compensated for a loss it never suffered, and to be placed, not in the same position in which it would have been if the contract had been performed, but, in a much better position.” (Emphasis added.)

Bear Cat Mining Co. v. Graselli Chemical Co., 247 F. 266 (CCA 8) (p. 288):

“*“Public interest and sound morality accord with the law in demanding this; and if the injured party through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls on him.”’*

Pasquel v. Owen, 186 F. 2d 263 (CA 8) (p. 273):

“Damages generally must be limited to compensation . . . and it was defendant’s duty to exercise reasonable diligence to minimize damages and in no event should a party to a contract be permitted to profit by its breach.”

The United States Supreme Court has confirmed this principle in cases like, *C. & O. v. Kelly*, 241 U.S. 483, 489; *U. S. v. Smith*, 94 U.S. 214, 218.

Since \$48.97 is all that the Commissioner would have recovered had he acted on the 1949 return, it is all that he can recover now.

CONCLUSION.

We submit that the technically correct disposition of this case is to hold that the deficiency notice procedure does not cover situations, where, as here, there is a claim only for "additions" under 1939 Code Sec. 294(d), and no claim of deficiency in the tax itself. In effect, the deficiency notice does not state facts constituting a cause of action. Accordingly, the judgment of the Tax Court should be reversed with directions to enter a decision for petitioner, without prejudice to any other remedy which the Commissioner may wish to pursue.

Alternative grounds for reversal have also been stated.

Dated, San Francisco, California,
February 17, 1959.

Respectfully submitted,
GEORGE OLSHAUSEN,
Petitioner.

(Appendices A and B Follow.)

Appendices A and B.



Appendix A

13. Through and including Form 1040 for the year 1949, the only reference to estimated tax returns in such forms reads as follows:

(1944)

“7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (attach withholding Receipts, Form W-2)

(B) By payments on 1944 Declaration of Estimated Tax

“8. If your tax (item 6) is larger than payments (item 7) enter *Balance of Tax Due* here.

“9. If your payments (item 7) are larger than your tax (item 6), enter the *Overpayment* here.

“check () whether you want this overpayment: Refunded to you; or Audited on your 1945 estimated tax

(1945)

“7. How much have you paid on your 1945 income tax?

(A) By withholding from your wages

(B) By payments on 1945 Declaration of Estimated Tax”

(Items “8” and “9” same as on 1944 Form, except for date)

(1946) (Same as on 1945 form, except for dates, and except that the three items are now numbered “8”, “9” and “10” respectively)

(1947) (Same as in 1946, except for dates)

(1948)

“8. How much have you paid on your 1948 income tax?

(A) Total tax in item 2, above (attach Original Forms W-2)

(B) By payments on 1948 Declaration of Estimated Tax.

(Items “9” and “10” same as in 1947 except for dates)

(1949)

“8. How much have you paid on your 1949 income tax?

(A) By tax withheld (in item 2, above) Attach Original Forms W-2.

(B) By payments on 1949 Declaration of Estimated Tax.

“9. If your tax (item 7) is larger than payments (item 8), enter *Balance of Tax Due* here.

This balance of tax must be paid in full with return.

“10. If your payments (items) are larger than your tax (item 7), enter the *overpayment* here.

Check ☒ whether you want this overpayment: Refunded to you ☐; or Credited on your 1950 estimated tax ☐

Do you owe any prior year Federal tax for which you have been billed?
(yes or no)

14. The only reference to estimated tax returns on Form 1040 for the taxable year 1950 reads as follows:

“6. How much have you paid on your 1950 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(B) By payments on 1950 Declaration of Estimated Tax.

“7. If your tax (item 5) is larger than payments (item 6) enter *Balance of Tax Due* here.

This balance of tax due must be paid in full with return

“8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment* here.

Enter amount of item 8 you want:

Refunded to you \$.....

Credited on your 1951 estimated tax \$.....

“Do you owe any prior year Federal tax for which you have been billed:

(yes or no)

15. The only references to estimated tax returns on Forms 1040 for the years 1951, 1952 and 1953 read respectively as follows:

(1951)

“6. How much have you paid on your 1951 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(B) By payments on 1951 Declaration of Estimated Tax (include any overpayments on your 1950 tax not claimed as a refund).

“7. If your tax (item 5) is larger than payments (item 6), enter *balance of tax due* here. This balance must be paid in full with return.

“8. If your payments (item 6) are larger than your tax (item 5) enter the *overpayment* here.

“Enter amount of item 8 you want \$.....
refunded
 \$..... on 1952 estimated tax.
credited

(1952) (Same as in 1951 except as to dates)

(1953) (Same as in 1952 except as to dates)

16. The only references to estimated tax in the Form 1040 for the taxable year 1954 reads as follows:

“12. Credits for amounts paid on your 1954 income tax:

A. Tax withheld (in item 2, Column D above) Attach Forms W-2.

B. Payments on 1954 Declaration of estimated Tax, Indicate District Director's Office where paid.

“13. If your tax (item 11) is larger than payments (item 12), the balance must be paid in full with return. *Enter such balance here.*”

“14. If your payments (item 12) are larger than your tax (item 11) *Enter the Overpayment here.*”

Appendix B

INDEX OF EXHIBITS BROUGHT UP AS ORIGINALS

Exhibit 1	90-day letter	R 21 (printed at R 6-9)
Exhibit 2	press release	R 31 (printed at R 46-48)
Exhibit 3	bill for \$10.25 and covering check for taxable year 1951	R 35
Exhibit 4	Petitioner's Income Tax Returns (Form 1040) 1949-53, both inclusive	R 36
Exhibit 5	Blank Forms 1040— 1943-44-45-46-47-48-49-51	R 36
Exhibit 6	Instruction Pamphlets Accompanying Form 1040 1948-50, both inclusive	R 37
Exhibit 7	Petitioner's Form 1040 Return for 1954	R 37
Exhibit 8	Bill and previous check for estimated tax 1956	R 38
Exhibit 9	Bill, previous check and letter concerning estimated tax 1957	R 39
Exhibit 10	letters in response to requests for documents	(printed at R 49-51)

No. 16183

**In the United States Court of Appeals
for the Ninth Circuit**

GEORGE OLSHAUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT
OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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MAR 30 1959

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16183

GEORGE OLSHAUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT
OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 52-59) are not officially reported.

JURISDICTION

This petition for review (R. 60-65) involves additions to the tax under Section 294(d) of the Internal Revenue Code of 1939 for the taxable years 1952 and 1953. On December 12, 1955, the Commissioner of Internal Revenue mailed to the taxpayer a statutory notice of deficiency for additions to the tax in the total amount of \$1,416.02. (R. 1, 6-9.) Within ninety days thereafter, and on February 24, 1956, the taxpayer filed a petition with the Tax Court for a redetermination of the deficiency under the provisions

of Section 272 of the Internal Revenue Code of 1939. (R. 3-9.) The decision of the Tax Court was entered on May 15, 1958. (R. 50.) The case is brought to this Court by a petition for review filed August 6, 1958. (R. 60-65, 68.) Jurisdiction is conferred by this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court has jurisdiction to render a decision where the Commissioner issued a statutory notice of deficiency which involved only additions to the tax under Section 294(d) of the Internal Revenue Code of 1939, and the taxpayer filed a petition for redetermination with the Tax Court.

2. Whether the Tax Court proceeding violates the due process clause of the Fifth Amendment to the Constitution in placing the burden of proof upon the taxpayer, and violates the Seventh Amendment in denying to him the right to a trial by jury in the Tax Court proceeding.

3. Whether the Commissioner's claim for the 1952 and 1953 additions to the tax, made in 1955, is barred by laches.

4. Whether the Tax Court was correct in holding that the taxpayer did not show that his failure to file declarations of estimated tax for 1952 and 1953 was due to reasonable cause.

5. Where the taxpayer fails to file a declaration of estimated tax, whether the Commissioner may impose concurrent additions to the tax under Section 294 (d)(1)(A) of the 1939 Code for failure to file a declaration of estimated tax and under Section 294

(d)(2) for substantial underestimation of the estimated tax.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 and of Treasury Regulations 118 are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts, some of which were stipulated (R. 16-18), and as found by the Tax Court (R. 53-55), may be stated as follows:

The taxpayer is an attorney and has practiced in the courts of California since 1926. (R. 53.)

The taxpayer filed a declaration of estimated tax either in 1943 or 1944. Under the belief that the law had been changed the taxpayer did not file any declarations during the years 1945 through 1953, which included the taxable years in issue. (R. 53.)

On January 15th of each year the taxpayer regularly filed a Form 1040 and paid the tax shown to be due. The taxpayer stated that he was under the impression that a filing of a declaration of estimated tax was optional if a Form 1040 was filed by January 15. The taxpayer was unable to recall how he gained this impression, and he made no investigation of the law. (R. 53.)

During the period 1945 through 1953 the returns filed on the Form 1040 by the taxpayer disclosed his failure to file declarations of estimated tax. During the period between 1944 and 1953 he received a refund and was billed for additional amounts due. During this period the taxpayer was not contacted by the In-

ternal Revenue Service, and he believes the adjustments referred to above were mathematical. (R. 53-54.)

In each of the years 1946 and 1950 the taxpayer reported income apportioned under Section 107 of the Internal Revenue Code of 1939. The taxpayer was unable to recall how he found out how to use and compute his income under this section but thought he received such information from conversations with other attorneys who were familiar with this section. (R. 54.)

In preparing his returns on the Form 1040 the taxpayer used as a reference book the instruction pamphlet which usually accompanied the form, where a reference to the instructions appeared on the face of the Form 1040. (R. 54.)

On March 13, 1950, the Commissioner of Internal Revenue issued a press release pertaining to Section 294(d) of the 1939 Code. The taxpayer was unaware of this release until it was called to his attention in the fall of 1955 at a conference with revenue agents. (R. 54.)

In his deficiency notice the Commissioner made the following explanation (R. 54):

You did not file Declarations of Estimated tax nor make timely payments of estimated tax for the taxable years 1952 and 1953. No reasonable cause having been shown, you are liable for the additions to the tax provided by section 294(d)(1)(A) and section 294(d)(2), Internal Revenue Code (1939) for the taxable years 1952 and 1953.

The Tax Court found that the taxpayer's failure to file declaration of estimated tax for the years 1952 and 1953 was not due to unreasonable cause. (R. 54-55.) The Tax Court held that the taxpayer was subject to the imposition of the addition to tax under Section 294(a)(1)(A) for failure to file declarations and under Section 294(d)(2) for substantial underestimation of the estimated tax for both years. (R. 55-59.)

SUMMARY OF ARGUMENT

The taxpayer in the present case did not file any declarations of estimated tax for the years 1944 through 1953. In 1955 the Commissioner imposed additions to the tax under Section 294 (d)(1)(A) and (d)(2) of the 1939 Code against the taxpayer for the years 1952 and 1953 for failure to file declarations and for substantial underestimation of the estimated taxes for these two years. The Commissioner issued a ninety-day notice to the taxpayer in which tax liability for only these additions was determined. *The taxpayer filed a petition for redetermination with the Tax Court. Shue* The taxpayer, contested liability upon the grounds that the Tax Court lacked jurisdiction, that its proceedings were unconstitutional, that the Commissioner's determination was barred by laches, that the taxpayer had reasonable cause for failure to file the declarations, and that both additions could not be imposed concurrently. The Tax Court decided against the taxpayer on all of the above grounds.

1. The taxpayer chose to invoke the jurisdiction of the Tax Court for determination of this controversy, but the effect of his contentions now is to dis-

pute it. However, a number of cases have sustained the jurisdiction of the Tax Court to determine controversies involving solely additions under Section 294(d) of the Internal Revenue Code of 1939. These decisions have recently been approved by this Court in *Granquist v. Hackleman*, decided February 13, 1959 (59-1 U.S.T.C., par. 9277).

2. The Tax Court proceedings involving the additions under Section 294(d) do not violate the Seventh Amendment to the Constitution by denying to the taxpayer a right to a jury trial. The additions here involved are civil sanctions, and Congress has broad discretion in establishing the procedures by which its tax exactions may be made effective. This discretion extends to permit civil sanctions to be imposed on the basis of facts determined by an administrative agency. In establishing the Tax Court it is clear that Congress intended fact finding to be done by the court and not by a jury. In any event, if the taxpayer desired a jury trial he could have paid the amount determined to be owing, brought a refund action and requested a jury trial.

The Tax Court proceedings also do not violate the due process clause of the Fifth Amendment by imposing the burden of proof upon the taxpayer. Here the burden of proof is imposed by statute, by Section 294(d)(1)(A), which requires that a taxpayer establish reasonable cause for failure to file a timely declaration. Congress can require a taxpayer to assume the burden of proof, even where additions are involved.

3. Where the Commissioner determined in 1955 that the taxpayer was liable for additions involving the years 1952 and 1953, the Commissioner's determination was timely made and was not barred by laches, even apart from the fact that the United States generally is not subject to a defense of laches in asserting its rights.

Further, the Commissioner's determination is not barred by any doctrine of equitable estoppel. Such a doctrine also generally is not applicable to errors in law; it has been held not to apply to permit a person to take advantage of his own wrongdoing; and mere acceptance or acquiescence in returns filed by a taxpayer in previous years creates no estoppel against the Commissioner for later years. Finally, the taxpayer has not shown how he has been prejudiced by the Commissioner's failure to assert liability against him for earlier years for failing to file declarations; if anything, the taxpayer has benefited.

4. Section 294(d)(1)(A) imposes an addition for failure to file a declaration unless such failure is shown by the taxpayer to be due to reasonable cause and not to willful neglect. The question of reasonable cause is one of fact. The statutory provision requiring a timely declaration to be filed (Section 58 of the 1939 Code) is clear on its face. The taxpayer previously filed a declaration. He was an experienced attorney, and was particularly qualified to determine whether he must continue to file declarations. Nevertheless, he proceeded upon a mistaken

impression that he was not required to file any declarations without bothering to investigate to determine what the law held and without seeking or receiving competent advice that he was no longer required to file. Under the facts, mere ignorance of the law or reliance upon unfounded rumor would not constitute reasonable cause. Also, mere reliance upon the Commissioner's failure to advise him in past years that declarations were due would not constitute a reasonable belief either that the Commissioner was not enforcing a statutory requirement of filing or that the law no longer required a filing.

(5) The question as to whether the Commissioner may impose concurrent additions under Section 294 (d)(1)(A) for failure to file a declaration and under Section 294(d)(2) for substantial underestimation of the estimated tax was decided by this Court in favor of the Commissioner in *Hansen v. Commissioner*, 258 F. 2d 585. This issue is currently pending before the Supreme Court in *Acker v. Commissioner*, 258 F. 2d 568 (C.A. 6th), rehearing denied, 258 F. 2d 575, certiorari granted, 358 U.S. 940 (October Term, 1958, No. 553). The taxpayer has not advanced any arguments in the present case which would justify this Court to reverse its decision in *Hansen*.

ARGUMENT

I. The Tax Court had jurisdiction to render a decision holding that taxpayer owed additions to the tax under Section 294(d) of the Internal Revenue Code of 1939

The only amounts in controversy are additions to the tax under Section 294 (d)(1)(A) and (d)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*)

for the years 1952 and 1953 respectively. (R. 52). Taxpayer chose to invoke the jurisdiction of the Tax Court for determination of this controversy. Yet he now argues (Br. 6-15), as he did in the court below, that the forum which he himself selected possesses no jurisdiction to determine the only matter in issue. Moreover, the jurisdiction of the Tax Court to pass upon the Commissioner's determinations with respect to additions under Section 294(d) of the 1939 Code has been sustained in a number of decisions where only additions to the tax were involved. *Davis v. Dudley*, 124 F. Supp. 426 (W.D. Pa.); *Newsom v. Commissioner*, 219 F. 2d 444 (C.A. 5th), affirming *per curiam* 22 T.C. 225; *Meyers v. Commissioner*, 28 T.C. 12; and *Marbut v. Commissioner*, 28 T.C. 687. (R. 55). In particular these cases have only recently been cited by this Court with approval in *Granquist v. Hackleman*, decided February 13, 1959 (59-1 U.S.T.C., par. 9277). There this Court indicated agreement with the view taken here by the Tax Court (R. 55), that the Tax Court is authorized to pass upon determinations of additions under Section 294(d) of the Internal Revenue Code of 1939 where only additions to the tax are involved.¹

¹ As the *Hackleman* case also points out, in *Muse v. Enochs*, 164 F. Supp. 561 (S.D. Miss.), the District Court held that deficiency procedures also were applicable in the case of additions to the estimated tax under Section 6654 of the Internal Revenue Code of 1954. With deference, it is the Government's view that the 1954 Code contains different provisions from the 1939 Code leading to a contrary result in this connection and thus, that no deficiency notice is necessary before assessing additions under Section 6654 if there is no deficiency in tax. Ac-

II. The Tax Court proceedings involving the additions to tax under Section 294 (d)(1)(A) and (d)(2) of the Internal Revenue Code of 1939 do not violate the Fifth and Seventh Amendments to the Constitution

It should first be noted that the taxpayer does not question the constitutionality of Section 294(d) of the 1939 Code, *supra*.² Instead, an examination of the taxpayer's brief on this issue reveals that he is contending that the procedures of the Tax Court itself violate the Fifth and Seventh Amendments. As we shall show, this contention is erroneous.

The taxpayer's contention (Br. 16-19), that to enforce collection of the additions by means of the Tax Court procedure would deny him his constitutional right to a trial by jury, appears to rest upon the assumption, repeatedly asserted by the taxpayer (see Br. 16, 17), that the additions under Section 294(d) "are imposed on the basis of alleged fault" and accordingly are either criminal or quasi-criminal in nature. The short answer to this is that these additions are only civil ad valorem sanctions, and Congress has broad discretion in establishing procedures by which its tax

cordingly, the Government has appealed to the Court of Appeals for the Fifth Circuit the District Court decision in the *Muse* case.

² In *Erwin v. Granquist*, 253 F. 2d 26, this Court upheld the constitutionality of Sections 58 (Appendix, *infra*) and 294(d). In *Walker v. United States*, 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939, Section 294(d)(1)(A), *supra*, was held constitutional against an attack, among others, that it violated the due process clause of the Fifth Amendment, and in *Beacham v. Commissioner*, 255 F. 2d 103 (C.A. 5th), the Tax Court's determination, that Sections 58, 59 (26 U.S.C. 1952 ed., Sec. 59) and 294(d) of the 1939 Code did not violate the due process clause of the Fifth Amendment, was upheld.

exactions may be made effective. *Steward Machine Co. v. Davis*, 301 U.S. 548; *Helvering v. Davis*, 301 U.S. 619. This discretion extends to the imposition of additions by way of civil sanctions, as under Section 294(d), and to permit such civil sanctions to be imposed on the basis of facts determined by an administrative agency. *Helvering v. Mitchell*, 303 U.S. 391; *Walker v. United States*, 240 F. 2d 601 (C.A. 5th), certiorari denied, 354 U.S. 939.

Further, the taxpayer's contention that he should not be denied a right to a trial by jury in the Tax Court ignores the long history of Tax Court procedure wherein Congress intended that fact finding should be done by the court and not by a jury. In *Wickwire v. Reinecke*, 275 U.S. 101, 105-106, the Supreme Court held that tax disputes need not be tried by jury trial if Congress does not desire this, and as Section 1117(b) of the 1939 Code (26 U.S.C. 1952 ed., Sec. 1117) (as well as its forerunner provisions) indicates, Congress did not intend to permit a jury trial in the Tax Court. The taxpayer's attempt to distinguish *Wickwire v. Reinecke*, *supra* (Br. 18-19), upon the ground that that case dealt with proceedings to determine the amount of a tax and not with an adjudication of fault, is misplaced here since the additions here involved are civil sanctions, and the Tax Court has jurisdiction over such additions.

Additionally, as the Tax Court correctly holds (R. 56), the taxpayer could have paid the amount of the additions asserted to be owing, and then sue for a refund in the District Court and request a jury trial. There is no merit to the taxpayer's contention (Br.

17-18) that this alternative would place an unconstitutional burden upon his right to a jury trial since the latter would be conditioned upon his first paying in full the disputed amount. Apparently, what the taxpayer is here seeking is the right to a jury trial without having to make a prepayment of the amount in dispute. In this the taxpayer fails to realize that prior to the establishment of the Board of Tax Appeals in 1924, a taxpayer had to pay the amount of the assessed tax as a condition precedent to the right to sue for a refund. *Flora v. United States*, 357 U.S. 63, petition for rehearing pending. As the Supreme Court points out in *Flora*, to ameliorate the hardship of requiring prelitigation payment Congress created a special court where tax questions could be adjudicated in advance of payment. Thus, a taxpayer is now in a preferred position. He now has two independent remedies open to him, with advantages and disadvantages in each. He may not, however, pick and choose a little from each for his benefit but is restricted to the pursuit of either in an orderly manner. *Flora v. United States supra*; *Bendheim v. Commissioner*, 214 F. 2d 26 (C.A. 2d); *McConkey v. Commissioner*, 199 F. 2d 892, 895 (C.A. 4th).

There is also no merit to the taxpayer's contention (Br. 19-22), that to place the burden of proof upon him in the Tax Court proceeding in a case involving additions to the tax violates the due process clause of the Fifth Amendment. Rule 32 of the Rules of the Tax Court of the United States (as revised to January 15, 1957) states that the "burden of proof shall be upon the petitioner, except as otherwise

provided by statute, * * *.” Section 294(d)(1)(A), *supra*, places the burden upon the taxpayer to show that his failure to file a declaration was due to reasonable cause and not to willful neglect. The question of burden of proof does not directly arise with respect to Section 294(d)(2), *supra*, since the addition for underestimation is automatically computed according to a formula set forth in the statute. In the present case there is no dispute either in the amount of the final tax or in the amount of the estimated tax, so that there is no controversy as to the amount of the addition for underestimation. Thus, the taxpayer’s complaint that he must bear the burden of showing reasonable cause is not directed solely against Rule 32 but also encompasses Section 294(d).

Here again the taxpayer’s contention is based upon the mistaken premise that the additions under Section 294(d) are not merely civil sanctions. Further, the taxpayer ignores the history of decided cases which hold that Congress can require a taxpayer to assume the burden of proof even where additions are involved. See *Boynton v. Pedrick*, 228 F. 2d 745 (C.A. 2d), certiorari denied, 351 U.S. 938, rehearing denied, 351 U.S. 990; see also *Helvering v. Taylor*, 293 U.S. 507, 515. It should also be noted that even if the taxpayer had paid the amount of the additions and sued for a refund, he would still have the burden of proof either in the District Court or Court of Claims proceeding.

Finally, the taxpayer is wrong in asserting (Br. 19-22), that the due process clause is violated because the Commissioner acted in a dual capacity as an administrator responsible for collecting revenue and as a quasi-judicial official "who has to make a judicial finding of fault." In the first place, it is clear that the Commissioner has not made any judicial determination or acted in a judicial capacity in this case. The Commissioner's determination that the additions were owing was subject to a judicial proceeding before an independent tribunal which arrived at a decision based upon the record made before it. Here the taxpayer availed himself of such a review by the Tax Court. Although the Tax Court technically may be an independent agency rather than a court (*Lasky v. Commissioner*, 352 U.S. 1027, affirming *per curiam* 235 F. 2d 97 (C.A. 9th)), nevertheless its proceedings are, and have been intended by Congress to be, in every sense of the word, judicial (*Blair v. Oesterlein Co.*, 275 U.S. 220, 227; *Stern v. Commissioner*, 215 F. 2d 701, 707-708 (C.A. 3d)). Thus, on appeal the relevant question is not whether the presumptive correctness of the Commissioner's determination violated due process (which we deny), but whether the Tax Court's proceedings were so unfair as to deny the taxpayer due process. We submit that the taxpayer has completely failed to prove this.

III. The Commissioner's determination is not barred by laches

The doctrine of laches is that a court of equity will not generally enforce a stale claim on behalf of a party who has slept on his rights. Such a doctrine is

not applicable here. The Commissioner's assertion in 1955 of a tax liability of the taxpayer for the years 1952 and 1953 clearly was timely made. In any event, as the Tax Court correctly holds (R. 56), it has long been held that the United States is not subject to a defense of laches in asserting its rights. *United States v. Summerlin*, 310 U.S. 414, 416.

The taxpayer's reliance upon the doctrine of laches (Br. 37-39) appears primarily to be predicated upon the facts that the taxpayer failed to comply with the statute requiring the filing of declarations for ten years, but the Commissioner asserted liability against him only for the last two years.

Since the taxpayer's tax liability for each year presents a separate claim, we suggest that in reality the taxpayer is here relying upon supposed equitable estoppel. Such a doctrine is not applicable here. In the first place, the doctrine of quasi-estoppel has been held not to be applicable against the Commissioner for mistakes in law. See *Automobile Club v. Commissioner*, 353 U.S. 180, 183-184. Second, this doctrine has been held not to apply to permit a person to take advantage of his own wrongdoing. *Sterns Co. v. United States*, 291 U.S. 54, 61-62. Here the taxpayer is attempting to profit by his failing to have complied with the law. Third, the cases hold that mere acceptance or acquiescence in returns filed by a taxpayer in previous years creates no estoppel against the Commissioner. *Niles Bement Pond Co. v. United States*, 281 U.S. 357, 361-362; *Caldwell v. Commissioner*, 202 F. 2d 112, 115 (C.A. 2d). Finally, the taxpayer has not shown how he has been prejudiced unfairly here.

This case does not present any transaction in which the taxpayer has made any binding election to his prejudice for future years. If anything, it would appear that the taxpayer has benefited for eight years by his derelictions, and the Commissioner is the party who has been prejudiced.

The taxpayer also complains that the Commissioner is barred by laches because he allegedly destroyed old Forms 1040 and accompanying instruction pamphlets for years preceding 1952. However, the taxpayer has failed to show the significance of these documents for the years 1952 and 1953, particularly in view of the clear language of Section 58 (Appendix, *infra*). As a matter of fact the Commissioner did supply him with copies of some old blank Forms 1040 (R. 49-51, Ex. 10), and the Commissioner advised the taxpayer that the Archives and Library of Congress keep samples of outdated forms and instructions, and that one of the local libraries also may have them. At the Tax Court proceedings the taxpayer introduced into evidence his income tax returns for the years 1949 through 1953 (Ex. 4), blank Forms 1040 for the years 1943 through 1949 and 1951 (Ex. 5), and instruction pamphlets for the years 1948 through 1952 (Ex. 6), ~~and it~~ does not appear how the taxpayer has been prejudiced by not having available a Form 1040 for only one year, 1950, ~~and that year being~~ prior to those here in issue, or by not having available instruction pamphlets for the years 1943 through 1947. Further, if there were relevant documents which the taxpayer has been unable to obtain, it would appear that this resulted from the fact that he made little effort to do

so. Finally, it would appear that the taxpayer is attempting to impose an impossible administrative burden by requiring the Commissioner to maintain an indefinite number of blank copies in stock of obsolete forms and pamphlets for an indefinite number of years, which previously had been made available to the public.³

IV. The Tax Court correctly held that the taxpayer did not show under Section 294(d)(1)(A) of the Internal Revenue Code of 1939 that his failure to file declarations of estimated tax for 1952 and 1953 was due to reasonable cause and not to willful neglect

Under the circumstances set forth below, Section 58 or the 1939 Code, (Appendix, *infra*) requires a taxpayer to file a declaration of estimated tax for the current year. Section 294(d)(1)(A), *supra*, provides for an addition to tax for failure to file a timely declaration "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect." The taxpayer in this case did not file any declarations for 1952 and 1953, and the Tax Court found and held (R. 54-55, 56-58) that his failure was not due to reasonable cause.

This question of reasonable cause is a question of fact. As the Eighth Circuit holds in *Coates v. Commissioner*, 234 F. 2d 459, 462-463:

We agree with the statement of the Tax Court that whether or not reasonable cause exists for failure to file the required declara-

³ For the above reasons, there is no merit to the taxpayer's contention (Br. 48-51) that the Commissioner's recovery should be limited to \$48.97.

tion is a question of fact to be decided upon the peculiar circumstances of each case. How far and to what extent a taxpayer may relieve himself of responsibility for the timely filing of tax returns or declarations of estimated tax by delegating that responsibility to another would seem to be a question which properly should be left to the Tax Court for decision. While it is apparent from the evidence and the findings of that court that the failure of the petitioners to file a timely declaration of estimated tax was due to their complete reliance upon Deeken to attend to all of their tax matters, we are not called upon to substitute our judgment for that of the Tax Court as to whether such reliance constituted reasonable cause for failure to file the declaration of estimated tax required of the petitioners by law.

See also *Ferrando v. United States*, 245 F. 2d 582, 587-588 (C.A. 9th); *Kaltreider v. Commissioner*, 255 F. 2d 833, 839 (C.A. 3d); *Clark v. Commissioner*, 253 F. 2d 745, 751 (C.A. 3d).

The taxpayer attempts to excuse his failure to file declarations in 1952 and 1953 on the grounds (Br. 25-27, 33) that, in preparing his tax returns for the years 1944 through 1953, he relied upon the instruction pamphlets which accompanied the Form 1040, and these pamphlets did not require the filing of both a declaration and a final return for the same years prior to 1950, and that (Br. 26, 28-33) he filed final returns for the years 1944 through 1953 which showed on their face that he had not filed any declarations, but the Commissioner did not raise

any objections until 1955. In essence, the taxpayer is seeking to justify his failure to file declarations upon a mistaken impression of the law and upon the failure of the Commissioner to advise him that he was not complying with the law. As the relevant decisions hold, such asserted excuses do not constitute reasonable cause.

The language of Section 294(d)(1)(A), *supra*, is unambiguous. It imposes the addition for failure to make and file a declaration unless such failure "is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect * * *." Thus, the burden is clearly upon the taxpayer to establish reasonable cause.

The requirement in Section 58 for making and filing a declaration is also very clear. This section provides that every individual whose gross income for the year from wages can reasonably be expected to exceed \$4,500 plus \$600 for each exemption, or whose gross income from sources other than wages can reasonably be expected to exceed \$100 and his gross income to exceed \$600, must file a declaration. For 1952 and 1953, the years here in issue, the taxpayer's income exceeded these statutory amounts. (Ex. 4.)

The taxpayer's asserted excuse of reasonable cause based upon a mistaken impression of the law is not supported by the relevant decisions. These hold that ignorance of statutory requirements, or reliance upon unfounded rumor, is inadequate to constitute reasonable cause for failure to file a declaration. *Fischer v. Commissioner*, 25 T.C. 102; *Joyce v. Commissioner*, 25 T.C. 13; *Riddell v. Commissioner*, decided March

27, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,074), appeal to the Fifth Circuit dismissed July 3, 1957; *Hansen v. Commissioner*, decided June 28, 1957 (1957 P-H T.C. Memorandum Decisions, par. 57,113), affirmed and reversed on other issues by this Court, 258 F. 2d 585, currently pending in the Supreme Court on other issue (October Term, 1958, No. 380). Furthermore, the decisions hold that a mistaken impression that if a taxpayer files a final return by January 15th, he need not file a declaration is not sufficient to constitute reasonable cause. *Fischer v. Commissioner, supra*. See *Joyce v. Commissioner, supra*.⁴

These decisions are particularly applicable here. The taxpayer is a lawyer of over thirty years experience. He should have been aware of the plain requirement to file a declaration. In any event, he is particularly qualified to investigate to determine whether his impressions of the law were correct. Indeed, when it was to his advantage, he had no diffi-

⁴ Section 58(d)(3) of the 1939 Code states that if a taxpayer files a final return by January 15th of the succeeding taxable year and pays in full the amount of the tax, the final return would take the place of a declaration, and the taxpayer would not be required to file a separate declaration if he had not previously been required to file a declaration. Also, if the tax shown on the final return was greater than the amount previously estimated, then a final return filed by January 15th would be considered as an amendment of the declaration and a separate amended declaration need not be filed. This provision, however, clearly does not dispense with the necessity for filing a timely declaration for the previous taxable year where one's income can be reasonably estimated to exceed the statutory amount. As we have pointed out, *supra*, the taxpayer's income for 1952 and 1953 exceeded the statutory amounts, and required a timely declaration to be filed.

culty in acquiring a correct understanding of the more complex requirements of Section 107 of the 1939 Code (26 U.S.C. 1952 ed., Sec. 107), relating to the spreading out over several years of compensation for services rendered for a period of thirty-six months or more. (R. 40-42.) On the other hand, when it was not to his advantage, he admitted (R. 42-43) that he did not make any attempt to ascertain the statutory requirements for filing a declaration. The taxpayer's claimed lack of knowledge is further suspect in view of his previously having filed a declaration for 1943 (R. 33), and his admission (R. 42-43) that, although he understood that the law was changed in 1944 to make it optional either to file a declaration or a final return, he did not know upon what basis he understood this to be so. He did not verify his impression but decided anyway not to file declarations, although he had during these years verified other matters. Thus, as this Court has held in another case involving the imposition of negligence penalties (*Fihe v. Commissioner*, decided October 21, 1958 (1958-2 U.S.T.C., par. 9891)), as an experienced attorney, the taxpayer "cannot claim ignorance as an excuse for his flagrant disregard of the revenue laws."

Nor can the taxpayer take much comfort from his assertion (Br. 26-28) that none of the pamphlets prior to 1950 nor the Forms 1040 affirmatively required him to file a declaration. Contrary to this assertion, an examination of the Forms 1040 for the years 1943 through 1949 and 1951 (Ex. 5) reveals that these contained spaces where a taxpayer was re-

quired to show the amount he paid on his declaration of estimated tax. Further, the instruction pamphlets for the years 1948 through 1952 (Ex. 6) referred to the amount of the estimated tax which the taxpayer had previously paid (pp. 2, 16) and to the form on which a declaration of such tax had been made and filed. The pamphlet also advised the taxpayer (p. 1) that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue. Thus, a taxpayer, and particularly one who was an experienced attorney, was clearly placed on notice that he was required to file a declaration, or at the very least, to check whether a declaration should be filed. Suffice it to say that, with no more notice and less qualification to ascertain the law, hundreds of thousands filed such declarations during these years. The taxpayer's failure to file a declaration under these circumstances is clear evidence of a lack of reasonable cause.

There is also no merit to the taxpayer's contention (Br. 26, 28-33) that his reliance upon the Commissioner's failure to advise him that he was not complying with the law constitutes reasonable cause for not filing. The decisions have repeatedly rejected the contention that a taxpayer may rely upon the Commissioner's failure to notify him as constituting reasonable belief that the Commissioner is not enforcing the requirement to file a declaration. *Coates v. Commissioner*, *supra*; *Fischer v. Commissioner*, *supra*; *Joyce v. Commissioner*, *supra*; *Marbut v. Commissioner*, 28 T.C. 687; *Hansen v. Commissioner*, *supra*. As these cases hold, a failure to comply with the law

is not sufficient to shift upon the Commissioner the responsibility which is imposed by the statute upon the taxpayer. See *Caldwell v. Commissioner, supra*.⁵

V. Where the taxpayer failed to file any declarations of estimated tax for 1952 and 1953 the Tax Court correctly held that he is liable for additions to tax concurrently for substantial underestimation of the estimated tax under Section 294(d)(2) of the 1939 Code and for failure to file any declarations under Section 294(d)(1)(A)

Since the taxpayer failed to file any declaration of estimated tax for 1952 and 1953, the Commissioner imposed additions to tax for both years under Section 294(d)(2) of the 1939 Code, *supra*, for substantial underestimation of the estimated tax, in addition to additions for both years under Section 294(d)(1)(A),

⁵The taxpayer's reliance (Br. 34) upon such decisions as *Hatfried, Inc. v. Commissioner*, 162 F. 2d 628 (C.A. 3d); *Orient Investment & Finance Co. v. Commissioner*, 166 F. 2d 601 (C.A.D.C.); and *In re Fisk's Estate*, 203 F. 2d 358 (C.A. 6th), is misplaced. The present case does not present a situation like that involved in *Hatfried* and *Orient* where the taxpayers were faced with complicated problems of ascertaining whether they came under special statutory provisions, such as the personal holding company provisions, and where they reasonably could rely upon the advice of counsel or a qualified accountant that they did not come within such provisions and therefore were not required to file personal holding company returns. Also, the present case does not involve a situation like that in *Fisk's Estate*, where it was held that an executrix could rely upon an attorney to file a timely estate tax return. But see *Ferrando v. United States, supra*. Instead, as we have pointed out, *supra*, in the present case the requirement to file a declaration is plain, the taxpayer previously had filed a declaration, he was an experienced attorney but failed to ascertain whether he need not continue to file a declaration, and the record does not show that he was ever advised that he no longer was required to estimate.

supra, for failure to file declarations. The basis for the Commissioner's action, as expressed in Treasury Regulations 118, Section 39.294-1(b)(3)(a) (Appendix, *infra*), is that in the event of a failure to file a declaration the amount of the estimated tax for purposes of determining the underestimation is zero. The Tax Court sustained the imposition of both additions. (R. 58-59.)

This question was squarely before this Court in *Hansen v. Commissioner*, 258 F. 2d 585, currently pending on another issue in the Supreme Court (October Term, 1958, No. 380), wherein this Court held that both additions may be imposed concurrently. *Patchen v. Commissioner*, 258 F. 2d 544 (C.A. 5th); *Abbott v. Commissioner*, 258 F. 2d 537 (C.A. 3d), and *Kilborn v. Commissioner* (C.A. 5th), decided September 18, 1958 (1958-2 U.S.T.C., par. 9847), also support the Commissioner's position in this case. On the other hand, *Acker v. Commissioner*, 258 F. 2d 568 (C.A. 6th), rehearing denied, 258 F. 2d 575, held that only the addition for failure to file a declaration may be imposed, and that the provision of Treasury Regulations 111, Section 29.294-1(b)(3)(A), promulgated under the Internal Revenue Code of 1939 (which is similar to the above provision of Treasury Regulations 118), is invalid insofar as it holds to the contrary. The Commissioner filed a petition for a writ of certiorari on this question in *Acker* on December 2, 1958, and the Supreme Court granted his petition on January 19, 1959 (October Term, 1958, No. 553) (358 U.S. 940). See also *Harp v. Commissioner* (C.A. 6th), decided February 11, 1959

(1959-1 U.S.T.C., par. 9240), opinion modified by order of March 19, 1959. But see *Delsanter v. Commissioner* (C.A. 6th), decided March 4, 1959 (28 T.C. 845, 861-862), where the Tax Court had upheld the imposition of both additions and the Sixth Circuit, in a *per curiam* order, affirmed the decision of the Tax Court "upon the grounds and for the reasons stated in the opinion of Judge Raun filed July 18, 1957."

We submit that the taxpayer has not advanced any arguments which would warrant this Court to reverse its decision in *Hansen v. Commissioner, supra*. The taxpayer's contentions are contradictory. He first argues (Br. 40-41) that the addition for substantial underestimation under Section 294(d)(2), *supra*, cannot exist alone, but must fall along with the addition for no filing, i.e., the excuse of reasonable cause which will justify a failure to file will also expunge the addition for substantial underestimation. However, the language of Section 294(d)(2) does not contain any excuse based on reasonable cause, in contrast to the language of Section 294(d)(1)(A), and the relevant decisions hold that reasonable cause is not a defense to the imposition of additions under Section 294(d)(2). *Kaltreider v. Commissioner, supra*; *Clark v. Commissioner, supra*; *McMurtry v. Commissioner*, 262 F. 2d 589 (C.A. 5th), affirming *per curiam* 29 T.C. 1091; *Smith v. Commissioner*, 20 T.C. 663; *Estate of Hays v. Commissioner*, 27 T.C. 358. See *Patchen v. Commissioner, supra*.

The taxpayer next contends, in essence (Br. 41-48), that the additions under Section 294 (d)(1)(A) and (d)(2) are imposed for separate acts, that a failure

to file a declaration comprises only one act, and that, in the absence of clear language in the statute, both additions may not be imposed for failure to perform a single act. We submit that this contention has been presented and considered in the above Court of Appeals decisions. In any event, it is clear, as the decisions in *Hansen*, *Patchen* and *Wolf* point out, that both the statutory scheme and the legislative history show that Congress intended both additions to apply where a declaration is not filed. S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345), H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372); H. Rep. No. 1337, 83d Cong., 2d Sess., p. 100 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769). See *Cammarano v. United States* (Sup. Ct.), decided February 24, 1959 (1959-1 U.S.T.C., par. 9262), with respect to the weight to be given to subsequent Congressional action upon an interpretation given a previous statute by the Regulations and in demonstrating prior Congressional intent.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be affirmed.

Respectfully submitted.

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MARCH 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231, Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; and Sec. 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906].

DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable but including every alien individual who is a resident of Puerto Rico during the entire taxable year) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of \$4,500 plus \$600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed \$100 for the taxable year and his gross income to be \$600 or more.

* * * * *

(d) *Time and Place for Filing.*—

(1) *In general.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

* * * * *

(3) *Return as declaration of amendment.*—If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

* * * * *

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 271 [As amended by Sec. 14(a), Individual Income Tax Act of 1944, *supra*]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, “deficiency” means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return

was made by the taxpayer and an amount shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272 [As amended by Sec. 263(a), Act of December 29, 1945, c. 652, 59 Stat. 669].

PROCEDURE IN GENERAL.

(a)(1) *Petition to Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu

of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 294. [As amended by Sec. 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21; Secs. 6(b)(8), and 13(b) of the Individual Income Tax Act of 1944, *supra*; Sec. 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; and Sec. 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(d) *Estimated Tax*.—

(1) *Failure to file declaration or pay installment of estimated tax*.—

(A) *Failure to File Declaration*.—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credit under sections 32 and 35.

(B) *Failure To Pay Installments of Estimated Tax Declared*.—Where a declaration of

estimated tax has been made and filed within the time prescribed or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or $66\frac{2}{3}$ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the tax-

able year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and $66\frac{2}{3}$ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

* * * * *

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.294-1. *Additions to the tax.*—(a) *In general.*

Section 294(d) provides for certain additions to the tax in the case of—

(1) Failure to file timely a declaration of estimated tax;

(2) Failure to pay within the time prescribed any installment of declared estimated tax; and

(3) Substantial underestimate of the estimated tax.

These additions to the tax are in addition to any applicable criminal penalties.

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax.*—(1) *Failure to file declaration.*

(i) Section 294(d)(1)(A) provides for an addition to the tax in the case of a failure to make and file a declaration of estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax shall be in an amount equal to 5 percent of the unpaid amount of each installment and in addition 1 percent of the unpaid amount of the installment for each month (except the first) or fraction thereof during which such amount remains unpaid. Such addition to the tax with respect to any installment due but unpaid shall not exceed 10 percent of the unpaid portion of such installment. For the purposes of section 294(d)(1)(A), the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits for tax withheld at source.

* * * * *

(2) *Failure to pay installment of declared estimated tax.* (i) Section 294(d)(1)(B) provides for an addition to the tax in the case of the failure to pay an installment of the declared estimated tax within the time prescribed unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not due to willful neglect. Such addition to the tax is applicable to delinquency in payment only (a) where a timely declaration

of estimated tax has been made and filed or (b) where the Commissioner has found that the failure to make and file a timely declaration was due to reasonable cause and not to willful neglect. Such addition to the tax shall be in an amount equal to 5 percent of the unpaid amount of each installment of declared estimated tax and in addition 1 percent of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. The addition to the tax is limited with respect to any installment due but unpaid to 10 percent of the unpaid portion of such installment. Such addition to the tax is not applicable in cases to which the addition to the tax under Section 294(d)(1)(A) applies.

* * * * *

(3) *Substantial understatement of estimated tax.* (i) Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which falls the death of the taxpayer. Except as hereinafter provided—

(a) In the case of individuals, other than those exercising the election under Section 60 (a), relating to farmers, an addition to the tax under Section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages under Section 35 and the credit under Section 32) is less than 80 percent of the tax imposed by Chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * * *

No. 16,183

IN THE

United States Court of Appeals
For the Ninth Circuit

GEORGE OLSHAUSEN,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE OLSHAUSEN,

1238 Pacific Avenue,

San Francisco 9, California,

Petitioner.

FILED

APR 21 1959

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No. 16,183

IN THE

**United States Court of Appeals
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GEORGE OLSHAUSEN,

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VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF.

Respondent has filed a brief which misstates some issues and ignores others. In answering it, we combine respondent's statement of the respective issues with their discussion.

**I. APPLICABILITY OF DEFICIENCY NOTICE PROCEDURE—
JURISDICTION OF TAX COURT.**

A. On pages 5-6 and again at 8-9, respondent claims the issue to be whether the Tax Court had jurisdiction, asserting that petitioner denies this here and before the Tax Court. *This is not and never has been the contention.* We believe rereading of Petitioner's Opening Brief, pp. 6-14 will make this clear. Respondent here reverses the usual technique of brief-

writing. Normally a brief writer tries to find an authority which fits the facts of the case at bar. Respondent, on the contrary, tries to bend the facts of the case at bar to fit an authority (e.g., *E. C. Newsom*, 22 T.C. 22). Apparently respondent is disinclined to discuss petitioner's real argument, but prefers to knock down a straw man.

B. The argument which *was and is made* (and not mentioned by respondent) is that since Sec. 294(d) provides neither (a) that the "additions" shall be collected as part of the tax, nor (b) that they shall be collected in the manner of deficiencies, they fall into the *third* category of claims which must be enforced by an action in the District Court. Not only is this form of remedy specifically mentioned in the 1939 Code (Secs. 3740-45) but it is a well known and well established method. It was used in *Felton v. U.S.*, 96 U.S. 699, *U.S. v. Regan*, 232 U.S. 37, and *Hepner v. U.S.*, 213 U.S. 103, all cited on our opening brief.

Granquist v. Hackleman, No. 16035, decided Feb. 13, 1959, says, among other things:

"§ 294(d) does not, however, contain the language quoted, which was contained in § 291 of the 1939 Code but which was omitted from § 6651 of the 1954 Code.

* * * * *

"There is a question, however, whether the assessments in the instant case may properly be called deficiencies."

(In *Granquist v. Hackleman* the taxpayer argued that he should be granted the deficiency notice pro-

cedure. There was no issue before the Court as to whether he might be entitled to a *better* procedure.)

C. Our constitutional arguments on this point, were made first of all in aid of construction of Sec. 294(d). (Pet. Op. Br. pp. 15-22.)

Respondent tries to meet these arguments separately at Resp. Br. pp. 10-14.

1. At best, respondent's arguments are confused. They sound as if counsel had not bothered to reread the VIIth Amendment. At Resp. Br. p. 6 they state this issue correctly in asserting that

"The Tax Court proceedings involving the additions under Section 294(d) do not violate the *Seventh Amendment . . .*" (Italics added.)

But on p. 10 they say our argument to be

"that the additions under Section 294(d) are imposed on the basis of alleged fault and accordingly *are either criminal or quasi criminal in nature. . . .* The short answer to this is that these additions are only *civil ad valorem sanctions*."

". . . The discretion extends to the imposition of *civil sanctions*, as under Section 294(d) and to permit such civil sanctions to be imposed on the basis of facts determined by an administrative agency. . . .

". . . The taxpayer's attempt to distinguish *Wickwire v. Reinecke . . .* upon the ground that that case dealt with proceedings to determine the amount of a tax and not with an adjudication of fault, is *misplaced* here since the additions here involved are *civil sanctions . . .*"

(p. 13) “Here again the taxpayer’s contention is based upon the *mistaken premise* that the additions under Section 294(d) are *not merely civil sanctions*.” (Italics added.)

But the Seventh Amendment deals exclusively with civil actions. (The Sixth Amendment deals with criminal prosecutions.) *In citing the Seventh Amendment we assumed that the sanctions of Sec. 294(d) are civil sanctions.*

At p. 11, respondent also argues, as quoted above, that supposedly “civil sanctions [may be] imposed on the basis of facts, determined by an administrative agency.”

This is the only argument that makes a point, and we shall discuss it in detail in a moment. On its face it involves the “*fallacy of the excluded middle*”. Respondent argues that simply because the sanctions are not criminal, they may be enforced administratively—wholly overlooking or ignoring the Seventh Amendment which sets up a middle ground and guarantees a jury in *civil actions*.

2. Respondent’s argument (p. 11, *supra*) that civil sanctions may be imposed administratively, cites *Helvering v. Mitchell*, 303 U.S. 391, and *Walker v. U.S.*, 240 F. 2d 601. But, this *still leaves the serious question of constitutionality*, which the statute must be construed to avoid.

Of the two cases cited, *Walker v. U.S.* merely refers to *Helvering v. Mitchell*. It is followed in *Beacham v. C.I.R.*, 255 F. 2d 103, cited Resp. Br. p. 10, n. 2.

Helvering v. Mitchell, 303 U.S. 391, 402, has a dictum that civil sanctions may be imposed administratively. (The only thing which the case *decided* was that acquittal on a *criminal* charge did not bar the imposition of civil penalties.)

But this dictum does not remove the serious constitutional problem which the statute must be construed to avoid.

In the *first* place, the *dictum* in *Helvering v. Mitchell* does no more than contradict the *dicta* in *U.S. v. Regan*, 232 U.S. 37 and *Hepner v. U.S.*, 213 U.S. 213, to the effect that a jury trial is required in an action by the government to enforce a civil sanction. *U.S. v. Regan* emphasizes the civil nature of the proceeding by holding that the government need prove its case only by a preponderance of evidence, not beyond a reasonable doubt.

Obviously, conflicting *dicta* from the United States Supreme Court leave a serious constitutional question.

In the *second* place, the cases cited in support of the *dictum* in *Helvering v. Mitchell* are far from conclusive.

The United States Supreme Court cases which are cited are all immigration cases except *Passavant v. U.S.*, 148 U.S. 214, which was a customs case. The immigration cases are explicitly based on the sovereign's plenary power to determine who may cross its borders. (*Oceanic Steam Nav. Co. v. Stranahan*, 214 U.S. 320; *Lloyd Sabaudo S.A. v. Elting*, 287 U.S. 333, 334.) *This, of course does not apply to persons*

and things already in the country. The customs cases may be put on the same ground. Besides, *Passavant v. U.S.*, 148 U.S. 214, 221 points out that there was involved only “a matter of mere computation”. In the present case the statute requires determination of “reasonable cause” *versus* “willful neglect”.

Of the income tax cases cited in *Helvering v. Mitchell*, none is by the U.S. Supreme Court, and none even mentions the Seventh Amendment.

It is well settled that a case is not authority upon a point involved in the facts but not discussed in the opinion.

(*U.S. v. L. A. Tucker Truck Lines*, 344 U.S. 33, 38; *Holiday v. Johnston*, 313 U.S. 342, 352; *U.S. v. Mitchell*, 271 U.S. 9, 14; *New v. Oklahoma*, 195 U.S. 252, 256.)

Third, more recent cases (arising under the rent control statutes) have held the Seventh Amendment applicable to actions by the government to impose a civil sanction. See: *U.S. v. Jepson*, 90 F.S. 983 (D.C. N.J.):

(p. 984) “Long prior to our independence, there had grown up under original writs certain well-defined actions at common law, among them, the action of debt, covering, among other causes, suits for statutory penalties and *qui tam* actions.”

(p. 985) “ ‘ . . . thus, in this case, though it be an action on the statute, it is an action of debt which is a common law action, and will be tried in a common law manner, . . . ’ ”

(p. 986) “It is my thought that when a federal statute embraces a common law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute. The right of trial by jury in an action for debt still prevails whatever modern name may be applied to the action. To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments. It is by such methods that courts lose their power to enforce the Bill of Rights.”

Followed in *Leimer v. Woods*, 196 F. 2d 828 (C.A. 8).

To the same effect, *U.S. v. Strymish*, 86 F.S. 999, 1000—and see generally, *Hunt v. Bradshaw*, 251 F. 2d 103, 108 (C.A. 4).

3. On page 11, of its brief, respondent talks about “the long history of Tax Court procedure wherein Congress intended that fact finding should be done by the court and not by the jury.”

That begs the question and is bad history. As shown in our Opening Brief (pp. 9-10), the 1939 Act is different from the acts of 1918 and 1921. If the earlier acts intended to deny a jury, the literal meaning of the 1939 Act shows an intention to restore it.

Apart from this, “long history” cannot change the meaning of a statute (*Holiday v. Johnston*, 313 U.S. 342, 351) nor, for the same reasons, of the Constitution. *Fairbank v. U.S.*, 181 U.S. 283, 310-11.

4. The issue of the inverted burden of proof is on no different footing. *Boynton v. Pedrick*, 228 F. 2d

745, Resp. Br. p. 13, does not refer to the constitutional question, nor cite *Western & A. R.R. v. Henderson*, 279 U.S. 639. *Helvering v. Taylor*, 293 U.S. 507, 515 deals with determination of a tax, not with imposition of a sanction.

On page 14 of Resp. Br. respondent gets further confused about the inverted burden of proof.

It *first* argues that the proceedings of the Tax Court are judicial. Without admitting the point, it would bring the matter clearly within the rule of *W. & A. R.R. v. Henderson*, 279 U.S. 639, in which the proceedings were also judicial.

Second, respondent says, "on appeal the relevant question is not whether the presumptive correctness of the Commissioner's determination violated due process (which we deny) but whether the Tax Court's proceedings were so unfair as to deny the taxpayer due process".

But the presumption of the correctness of the Commissioner's determination is an integral part of the Tax Court proceedings.

Where, as here, the Commissioner has found "wilful neglect", the presumption is *that there was wilful neglect*. This is quite similar to the presumption of negligence, which was held unconstitutional in *W. & A. R.R. Co. v. Henderson, supra*.

5. The foregoing authorities show that very substantial constitutional questions would arise from permitting the *civil sanctions* of sec. 294(b) to be enforced administratively. They do not in terms fall

within any provision for administrative enforcement which the statute contains. Under these circumstances, both the terms of the statute and the rule against raising unnecessary constitutional issues would put them within secs. 3740-45, providing for actions in the U. S. District Court.

II. GOVERNMENT BARRED BY LACHES. (Resp. Br. pp. 14-17.)

A. Respondent's discussion of this point begins at page 14 of its brief, but gets over to page 16 before mentioning the chief point—the fact that the government itself destroyed relevant evidence.

The relevance of the old forms is shown at App. Op. Br. p. 38.

Compare also the argument at Resp. Br. p. 22 that “The pamphlet also advised the taxpayer (p. 1) that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue.” What the collector's office would have answered in any particular year depends upon the ruling which was being enforced in that year. The records of each year are therefore relevant to the present case.

So at Resp. Br. p. 21 respondent assumes that the 1943-44 change did not actually occur, as the basis for arguing that “the taxpayer's claimed lack of knowledge is further suspect”. This argument is contrary to the findings of the Tax Court, as we show below. But since respondent has made the point, we now consider it at face value.

The contention that in fact no change of ruling or practice occurred in 1943-4 *makes these years relevant to the case* and likewise makes the *whole intervening period relevant*. Consequently the records for this period are relevant. Respondent having itself destroyed the records as "obsolete" cannot now prevail.

B. Respondent asserts (Resp. Br. p. 16):

"... the Commissioner advised the taxpayer that the Archives and Library of Congress keep samples of outdated forms and instructions, and that one of the local libraries may also have them."

No record references are given for this statement, and it is untrue. (Cf. Pet. Ex. 10, R. 49-51.)

C. We submit that Ex. 10 answers the suggestion (Resp. Br. p. 16) that "he made little effort to do so" [obtain the old forms].

D. Respondent's complaint at the top of page 17 answers itself. Respondent says,

"Finally, it would appear that the taxpayer is attempting to impose an impossible administrative burden by requiring the Commissioner to maintain an indefinite number of blank copies in stack of obsolete forms and pamphlets for an indefinite number of years, which previously had been made available to the public."

1. The government need not keep its old records, but is cannot press claims which they touch, after it has destroyed the records as "*obsolete*".

2. The problem is essentially the same as that posed by confidential documents. The government may

withhold a document as confidential, but it cannot then press a prosecution to which it is pertinent. (*Jencks v. U.S.*, 353 U.S. 657, 672; *U.S. v. Andolschek*, 142 F. 2d 503, 506.)

So with documents which are thought to have become "obsolete". The government, in pursuance of other policy, may make them unavailable by destroying them, but it cannot then press a claim to which they are relevant.

E. Nor is it an answer that the documents were once available to the public. If they are so old that the government has not kept them, there is no reason to hold that someone else must have kept them.

III. EVIDENCE DOES NOT SUPPORT FINDING OF WILFUL NEGLECT. (Resp. Br. pp. 17-23.)

A. There are two of our arguments which respondent does not answer.

First the object of Sec. 294(d) is to penalize wilful neglect. "Reasonable cause" is anything which negatives wilful neglect. (Cf. Pet. Op. Br. pp. 24-25.)

Second, respondent does not base "wilful neglect" upon the oversight of the instruction as to estimated returns appearing for the first time in the pamphlet for 1950.

B. Instead, respondent makes two other contentions.

1. At pages 21-22 respondent refers to the questions on Form 1040 about payments of estimated tax.

These questions are quoted in full in Appendix "A" to Petitioner's Opening Brief. They were always "how much have you paid on . . . Declaration of Estimated Tax".

On its face, this form of question permitted the answer "None". That is the answer which was actually given, and the Commissioner raised no objection for nine years. In short, the Forms 1040 were at best ambiguous, and the Commissioner's acceptance of them as rendered, year after year, was the resolution of an ambiguity.

2. The rest of respondent's argument is that the *statutes* were supposedly unambiguous, and the taxpayer, as a lawyer, had the facilities to check the instructions pamphlets against the statute. But these contentions will not support a finding of "wilful neglect".

a. The supposed unambiguousness of the statute would be important only if petitioner were bound to consult it, a point which we discuss below. But apart from that, the argument does not hold water. *For if things were that simple, why did the Commissioner change his instructions pamphlets when there was no change in the statute?*

Apparently the statute was not unambiguous to the Commissioner; it cannot be held unambiguous to those who are not tax experts.

The United States Supreme Court has held that taxation is largely an arcane subject, about which the specialized agencies know more than the courts. In

Dobson v. C.I.R., 320 U.S. 489, the Supreme Court said (p. 498):

“It [the Tax Court] deals with a subject that is highly specialized and so complex as to be the despair of judges.”

In tax matters the general practitioner stands in much the same relation to the tax specialist as the layman stands to the general practitioner.

Under these circumstances a tax statute cannot be said to be “unambiguous” to a taxpayer, where the taxing authorities themselves have given it varying applications.

So it is probably a misstatement of the issue (the old records being unavailable) for respondent to say at Br. p. 19:

“In essence, the taxpayer is seeking to justify his failure to file declarations upon a *mistaken* impression of the law and upon the failure of the Commissioner to advise him that he was *not* complying with the law.” (Italics added.)

This assumes that the Commissioner did not change his practice; the instructions pamphlets, however, indicate the contrary. If the Commissioner did not require estimated tax returns before 1950, then there was no mistaken impression of the law, and no occasion to “advise” of “not complying with the law”.

The defense is not the above, but that the change was noted obscurely, in a way that could easily be missed. Not even respondent now argues that overlooking the change when it was made (1950-51) would

constitute “wilful neglect”. (Cf. *Felton v. U.S.*, 96 U.S. 699, 702, quoted Pet. Op. Br. pp. 33-4.)

b. The other argument is that the taxpayer, being a lawyer, should have checked the correctness of the instructions pamphlets against the statute, and not doing so, was guilty of “wilful neglect”. See Resp. Br. p. 20:

“In any event, he is particularly qualified to investigate to determine whether his impressions of the law were correct.”

(p. 22) “Thus, a taxpayer, and particularly one who was an experienced attorney, was clearly placed on notice that he was required to file a declaration, or at the very least *to check* whether a declaration should be filed.” (Italics added.)

On p. 21 of his brief, respondent also argues that because petitioner consulted other sources on the matter of apportionment, he should have consulted other sources on matters contained in the instructions pamphlets.

This whole argument will not bear analysis.

First. The instructions pamphlets are themselves *administrative interpretations* of the statute. With one exception (see *infra*) there is neither occasion nor logic in checking the correctness of the administrative interpretation *against the statute*. In the *first* place, there is no *a priori* ground for assuming the instruction pamphlet to be wrong, or to be wrong in any particular respect. What the respondent asks, is that the taxpayer, if a lawyer, should check the entire

instructions pamphlet against the statute, somewhat in the manner of a proofreader. But then the instructions pamphlet would serve no purpose.

Secondly, there is no logic in going from the instructions pamphlet to the statute. Like any other executive interpretation, the instructions pamphlet is an executive application of the statute. The statute is general, the executive interpretation is specific. The logical thing is to go from the statute to the executive interpretation, not *vice versa*.

Third. The only basis for going from the instructions pamphlet to the statute would be that the instructions pamphlet is so far out of line that it is *contrary* to the Acts of Congress (as were the "treasury regulations" in *U.S. v. Calamaro*, 354 U.S. 351, and *Granquist v. Hackleman*, No. 16035).

And that is, in fact, the Commissioner's contention. Respondent claims that if the taxpayer is a lawyer, he must assume, *a priori* and on general principles, that the Commissioner is acting contrary to United States statutes. Otherwise the lawyer-taxpayer is guilty of "wilful neglect". We submit the contention refutes itself.

c. (1) Nor is respondent's position advanced by the item "that if he needed more information he should inquire at the nearest office of the Collector of Internal Revenue". (Resp. Br. p. 22.) This refers to nothing in particular, and leaves the matter of "need[ing] more information" to the taxpayer's judgment. Respondent is wholly wrong in arguing that

this catch-all refers specifically to an estimated tax return and that supposedly—

(Resp. Br. p. 22) “Thus a taxpayer, and particularly one who was an experienced attorney, was *clearly placed on notice* that he was required to file a declaration, or at the very least, to check whether a declaration should be filed.” (Italics added.)

Moreover, even if there were a misjudgment as to whether it was necessary to get information outside the instructions from the Collector’s Office, or whether the instructions pamphlet was sufficient—this would in no event constitute “wilful neglect”. (*Felton v. U.S.*, 96 U.S. 699, 702.)

(2) Respondent also argues that because the petitioner went outside the instructions pamphlet for the apportionment under Sec. 107 of the 1939 Code, it was supposedly “wilful neglect” not to go outside the instructions pamphlet on other things.

The difference, of course, is that the instructions pamphlets do not purport to cover apportionments under Sec. 107, but they do purport to cover estimated tax returns. The Commissioner’s argument is that if the taxpayer goes beyond the instructions pamphlet on matters with which the pamphlet does *not* deal, he must, to avoid “wilful neglect” go beyond the instructions pamphlet in matters with which it *does* deal. Again, we submit, the contention refutes itself.

Where, as here, the tax has always been paid in full, the “advantage” or disadvantage to which respond-

ent refers (Resp. Br. p. 21) in filing or not filing the additional forms is inconsequential.

(3) The insinuation at Resp. Br. p. 21 that after 1944 petitioner filed no estimated return, knowing the law to require them, is *contrary to the finding* of the Tax Court, which finds the existence of petitioner's belief:

(p. 53) "Under the belief that the law had been changed, petitioner filed no declaration during the period 1945 to 1953, inclusive."

Since respondent attempts to prevail on findings which the Tax Court did not make, it must be inferred that respondent doubts his right to prevail on the findings which the Tax Court *did* make.

(4) On page 22 respondent refers to the "hundreds of thousands who filed such declarations during these years". Considering the total population of the United States "hundreds of thousands" (i.e. less than a million during a period of prosperity in a country of 150,000,000 population) is a small percentage. If as many as 2,000,000 1040-returns were filed, which is altogether likely during a period of prosperity and high taxes (and of which respondent has peculiar knowledge) "hundreds of thousands" would be *less than half*.

In any case, the true significance of the figure would appear only if it were compared with the number who did *not* file. The record contains no evidence on that point (it is within the peculiar knowledge of respondent). But the issuance of the press release of March

13, 1950, and the change in the language of the instructions pamphlets for 1950 and after, indicate that the number of *nonfilers* must have been substantial. The issuance of the press release and change in the instructions pamphlets also indicate that respondent himself considered his instructions before 1950 to be *at least unclear*.

In *Fihe v. C.I.R.*, 15726 (decided Oct. 21, 1958) the taxpayer did not claim any legal basis for his acts, but instead argued that he had made *other mistakes against himself*. The Court said, "Carelessness in one regard is no counterweight for carelessness in another for which a penalty is provided."

That, of course, is not the situation here. Apart from that, any inconsistencies between *Fihe v. C.I.R.* and *Dobson v. C.I.R.*, 320 U.S. 489, 498-9, would have to be resolved in favor of the language of the Supreme Court.

IV. NO DOUBLE PENALTY UNDER SEC. 294(d).

(Resp. Br. pp. 23-6.)

A. Respondent adds only three points to what is already discussed in our opening brief.

First, *Delsanter v. C.I.R.* (6th Cir.) is cited (Resp. Br. p. 25) as if it were contrary to the *Acker* and *Harp* cases. But the Tax Court in *Delsanter v. C.I.R.* decided some points in favor of the Commissioner and others in favor of respondents, writing an Opinion and findings of eighteen pages. The *per curiam* decision of the Sixth Circuit does not disclose what ques-

tions were submitted to it. (Since the petitioners had prevailed on some points under Sec. 294(d) it may be that they brought only other matters to the Court of Appeals.)

Second. It is quite true that we made alternative arguments as to the applicability of Secs. 294(d)(1)(A) and 294(d)(2). See Pet. Op. Br. pp. 40-48, and Resp. Br. pp. 25-6.

We argued that the Commissioner's construction of the statute is wrong in all respects—there can be no double penalty; under the commissioner's argument Sec. 294(d)(1)(A) could never stand alone. We also argue, that even if the Commissioner should be right about the *double penalty*, he is still wrong about a 294(d)(2) penalty where non-filing is held due to reasonable cause. In objecting to this argument, the Commissioner fortifies our point that, *under the Commissioner's interpretation, Sec. 294(d)(1)(A) can never stand alone.*

Third. *Commarrano v. U.S.*, 79 Sup. Ct. Rep. 524, 27 L.W. 4131 (Resp. Br. p. 26), furnishes its own answer. At p. 532, the opinion distinguishes other factual situations—

“This is not a case where the Government seeks to cloak an interpretative regulation with immunity from judicial examination as to conformity with the statute on which it is based simply because Congress has for some period failed affirmatively to act to change the interpretation which the regulation gives to an otherwise unambiguous statute, Cf. *Jones v. Liberty Glass Co.*, 332 U.S.

524. Nor is it a case where no reliable inference as to Congress' intent can be drawn from re-enactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of the re-enactment."

In the 1954 act there was not a re-enactment but a change—a change which dealt with exactly the situations mentioned in the above quotation. The Commissioner had given an erroneous "interpretation" "to an otherwise unambiguous statute", and there was a conflict between the Tax Court and the District Courts. See opinion of Tax Court, R. 58; also discussion both in *Acker v. C.I.R.*, 258 F. 2d 568, 572 and *Patchen v. C.I.R.*, 258 F. 2d 544, 551-2.

B. If *C.I.R. v. Acker* has not yet been decided by the Supreme Court at the time of the oral argument of the present case, petitioner asks leave to file in this Court copies of the *amicus curiae* brief which he asked leave to file in the *Acker* case. It adds a few matters to the discussion in petitioner's opening brief.

V. OTHER POINTS.

A. Respondent does not answer the argument that the Commissioner cannot profit by his own delay (Pet. Op. Br. pp. 48-51) except in footnote 3 at Resp. Br. p. 17. Here respondent relates the question to the destruction of documents, which is another point. But if there is a connection, the point works against respondent. If respondent cannot profit by his own

delay at all, he cannot profit where his delay has been so great that in the meantime he has destroyed his own records as "obsolete".

B. Other matters, not separately answered are adequately covered by our opening brief and this Brief.

VI. CONCLUSION.

The conclusion of our opening brief remain valid. The decision of the Tax Court should be reversed as there indicated.

Dated San Francisco, California,

April 20, 1959.

Respectfully submitted,

GEORGE OLSHAUSEN,

Petitioner.

No. 16,183

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE OLSHAUSEN,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S APPLICATION FOR A REHEARING.

GEORGE OLSHAUSEN,

1238 Pacific Avenue,

San Francisco 9, California,

Petitioner.

FILE

DEC 30 1959

PAUL P. O'BRIEN,



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No. 16,183

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE OLSHAUSEN,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S APPLICATION FOR A REHEARING.

*To the Honorable Wm. Healy, William E. Orr, Oliver
D. Hamlin, CJJ.*

Petitioner respectfully asks for a rehearing in the above entitled case. A rehearing is necessary (1) to consider the impact of *C.I.R. v. Acker*, 28 L.W. 4009 on the question whether the penalties under 1939 Code Sec. 294(d)(1)(A) may be enforced by a deficiency notice; (2) to consider the point that there is no logical basis for a presumption of wilful neglect, and that such reverse presumption is unconstitutional as applied, at least where, as here, it is conceded that all *taxes were paid in full*; (3) because the opinion cites *Flora v. U. S.*, 357 U.S. 63, without noting that a rehearing was granted in that case; (4) because

the language of the statute is an inadequate basis for a finding of "wilful neglect"; (5) because the court has misunderstood the argument based upon the government's delay in making the claim.

We consider these in order.

1. **THE OPINION FAILS TO CONSIDER C.I.R. v. ACKER, 28 L.W. 4009, IN CONNECTION WITH THE QUESTION WHETHER PENALTIES UNDER 1939 CODE SEC. 294(d)(1)(A) MAY BE ENFORCED BY DEFICIENCY NOTICE.**

a. *C.I.R. v. Acker*, 28 L.W. 4009 holds that the "addition" under 1939 Code Sec. 294(d)(1)(A) is a *penalty*. This the present opinion recognizes.

1939 Code Sec. 271(a)(1) defines a deficiency as follows:

"271. *Definition of deficiency.*

(a) *In general.* As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which *the tax* imposed by this chapter, exceeds the excess of—

(1) the sum of (A) the amount shown as *the tax* by the taxpayer upon his return, if a return was made by a taxpayer and an amount was *shown as the tax* by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (h) (2), made" . . . (Emphasis, except headings, added.)

Sec. 272(a) of the same Code provides that a deficiency notice may be sent, when there is a deficiency “in respect of the *tax*”.

The obvious inference from this language is that a deficiency notice is not available to enforce a *penalty*, such as that under Sec. 294(d)(1)(A).

b. The cases which the opinion cites to the contrary, at pages 2-4 of the slip opinion are decisions of the lower federal Courts or of the Tax Court rendered *before the Supreme Court decision in C.I.R. v. Acker* (Nov. 16, 1959) 28 L.W. 4009. None of them, therefore, takes that opinion into account.

Likewise the rule “pay first and litigate later” was a rule applicable to *taxes*, not to *penalties*. This is shown by *Felton v. U. S.*, 96 U.S. 699, in which a penalty similar to the present one was enforced by a common law action. The quotations on pages 3 and 4 of the slip opinion confuse a tax and a penalty. So also on page 7 of the present opinion the Court refers to the penalty under 1939 Code Sec. 294(d)(1)(A) as both an “additional tax” and a “statutory penalty” *in one and the same sentence*.

Everything said on this subject in the present opinion and in earlier opinions, is said without reference to the holding of *C.I.R. v. Acker* that the “additions” under 1939 Code Sec. 294(d)(1)(A) are a penalty and not a tax.

A rehearing should be granted to consider the effect of the Supreme Court holding on this question.

2. REVERSED BURDEN OF PROOF UNCONSTITUTIONAL AS APPLIED.

The opinion says that the reversed burden of proof stems from the statute itself, rather than from Rule 32 of the Tax Court. We may accept this view for purposes of argument, since the result is the same either way.

“Wilful neglect” has been defined as requiring “‘a bad purpose’” or “‘non-justifiable excuse’” (*Felton v. U. S.*, 96 U.S. 699, 702; *Heikkinen v. U. S.*, 355 U.S. 273, 279). *It is evidently something more serious than simple negligence.*

The opinion says (p. 6) that “(wilful neglect) is a logical conclusion from . . . (failure to file)”.

We submit that if “failure to file” points logically to any “bad purpose” it would be a purpose to evade taxes. *But when the taxes are admittedly paid in full, failure to file cannot have the purpose of tax evasion—nor any other purpose.*

At least as applied to the admitted facts of this case, the reverse presumption rests on an inference having no support in logic or common experience.

At page 6 of the opinion the Court says, “the taxpayer can easily explain his failure if good cause existed therefor”. Precisely such a burden of explanation of non-negligence was held unconstitutional in *W. & A. Ry. Co. v. Henderson*, 279 U.S. 639, 640.

3. REHEARING GRANTED IN FLORA v. U. S., 357 U.S. 63.

At page 4 of the slip opinion the Court cites *Flora v. U. S.*, 357 U.S. 63.

A rehearing was granted in this case on June 22, 1959 (27 L.W. 3361) and it was re-argued on November 12, 1959 (28 L.W. 3171).

4. LANGUAGE OF STATUTE INSUFFICIENT BASIS FOR FINDING OF WILFUL NEGLIGENCE.

At page 7 the Court says:

“The absence of express instructions on the point would not excuse ignorance of the unambiguous requirement contained in §58 of the Internal Revenue Code of 1939.”

This opinion itself shows that “unambiguous requirements” are not a definitive guide. The “unambiguous requirement” for a deficiency notice is a deficiency in the *tax*—not the claim of a penalty. Yet this opinion holds the deficiency notice applicable to a *penalty*.

If “unambiguous requirements” are controlling, then the deficiency notice cannot be used to enforce a penalty; if “unambiguous requirements” are *not* controlling, then they are no basis for a finding of wilful neglect.

5. OPINION MISCONCEIVES ARGUMENT ON
LIMITATION OF RECOVERY.

On page 7 of the slip opinion it is said:

“We see no merit in petitioner’s contention that he should be *excused* from the payment of the additional tax because had demands for the statutory penalty been made earlier he would have been required to pay less”. (Italics added.)

The argument in this part of petitioner’s brief was not the payment should be *excused*, but that it should be *limited* to the amount accrued at the end of the first year—\$48.97.

See Petitioner’s Opening Brief, pages 48-51.

6. CONCLUSION.

The rehearing should be granted and the judgment of the Tax Court reversed *in toto*.

Dated, San Francisco, California,
December 30, 1959.

Respectfully submitted,

GEORGE OLSHAUSEN,
Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 30, 1959.

GEORGE OLSHAUSEN,
Petitioner.

No. 16184 ✓

**United States
Court of Appeals**
for the Ninth Circuit

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif. 10-31-58
NOV 21 1958

PAUL P. O'BRIEN, CLERK



No. 16184

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Court of Appeals
for the Ninth Circuit

No. 15,301

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPINION

Before: Denman, Senior Circuit Judge; Pope and
Barnes, Circuit Judges.

Barnes, Circuit Judge:

After waiving a jury trial, appellant Arthur King Wilson was tried and convicted by the District Court of six counts of wilfully attempting to defeat and evade the payment of federal income taxes and Federal Insurance Contribution Act (commonly known as "Social Security") taxes withheld from the wages of employees of Coast Redwood Company, Inc., a family corporation of which appellant was President, in violation of Section 2707(c) of the Internal Revenue Code of 1939,¹ as made applicable by Sections 1430 and 1627 of said Code. The periods involved in the six counts were the second, third, and fourth quarters of 1952, which encompassed the period from April 1, 1952, to December 31, 1952, inclusive. Counts One, Two, and

¹26 U.S.C. § 2707(c).

Three related to income taxes allegedly withheld and not paid over in the respective amounts of \$49,-913.33, \$15,605.48,² and \$41,149.38. Counts Four, Five, and Six dealt with F.I.C.A. taxes allegedly withheld and not paid over in the respective sums of \$5,559.95, \$3,807.79, and \$2,043.69.

The indictment charged in each and every count that appellant had committed the felonious offense

“* * * by failing and refusing to pay said * * * taxes withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to pay creditors other than the United States * * *”³

²The total sum withheld for federal income taxes in the third quarter of 1952 was \$44,524.53. However, a partial payment was made in this quarter in the amount of \$28,919.05, leaving a balance due and unpaid of \$15,605.48.

³The Government was not required to allege the particular manner by which the offense was committed. *United States v. Simmons*, 96 U.S. 360. The allegations are here set forth to crystallize the Government's position, not to state an essential element of the offense.

Appellant raises two questions on this appeal. The first and principal question may be characterized broadly as concerning the sufficiency of the evidence to support the denial of a motion for judgment of acquittal made at the close of the Government's case-in-chief and renewed after all the evidence was in. Actually appellant's argument on this point has two facets. He complains that the District Court applied an erroneous standard with respect to the subjective state of mind requisite to culpability under Section 2707(c), and further, that under the proper criterion the evidence is not sufficient to support the denial of his motions and the judgment of conviction. The other question tendered herein pertains to alleged error in the exclusion of evidence.

This is a unique criminal case. There does not appear to be a single reported decision involving a felony prosecution for failure to pay withholding taxes. The instant case is not distinguished for that reason alone. It is unusual as well in that the acts alleged to constitute the necessary overt and objective element of the violation of Section 2707(c) do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases.

The evidence, largely uncontroverted, discloses that appellant organized and incorporated Coast Redwood Co., Inc., in the State of California in May of 1945. It engaged in the logging and sawmill business with operations centered in the redwood

and fir forests of Northern California. The stock in the corporation was wholly owned by appellant and members of his family and he served actively as President from the date of incorporation. Coast Redwood Co. was one of several interrelated corporations owned entirely or substantially by appellant and members of his family and actively operated by appellant as President. Most of its business transactions and dealings were with these affiliated corporations. It functioned as a middle link in a vast chain of lumber enterprises whose activities extended from the acquisition of timber tracts to the sale of finished lumber. Two of these affiliated corporations, Union Bond and Trust Company and Ah Pah Redwood Company,⁴ owned or were purchasing the timber tracts upon which Coast Redwood Co. conducted its logging and cutting operations. Still another family corporation, A. K. Wilson Lumber Company, purchased rough lumber from Coast Redwood and remanufactured it into finished lumber for sale in the trade. In 1952 Coast Redwood sold all of its redwood log cants to A. K. Wilson Lumber Co.

Coast Redwood had originally been capitalized for \$5,000.00. It enjoyed success and prospered in the years preceding the indictment period and for that reason and perhaps also due in part to monies

⁴The Ah Pah Redwood Company was a wholly owned subsidiary of International Pulp & Paper Company. Appellant and his family owned all of the common stock and 20% of the preferred stock in the latter corporation.

derived from an abortive sale of certain assets of the corporation,⁵ Coast Redwood Company's capital at the end of the fiscal year on April 30, 1952, included earned surplus of \$306,433.04. This despite the fact that the corporation had encountered financial difficulties during that fiscal year and had incurred a net loss therein of \$274,323.95. Adversity continued to plague the corporation during the fiscal year ending April 30, 1953 (which included almost the entire period covered by the indictment), and it sustained a net loss of \$224,099.32. Part of this loss (the exact extent is vigorously disputed) was attributable to a summer fire which destroyed cut timber and hampered operations. As a result of its intensified financial plight, Coast Redwood Co. initiated proceedings under Chapter Eleven of the Bankruptcy Act on January 30, 1953. It was adjudicated a bankrupt on November 9, 1954.

A study of the past tax record of Coast Redwood Co. fails to reveal a portrait of a dutiful and diligent taxpayer. It had been delinquent in respect to

⁵Early in 1951, appellant sold the sawmill and other assets of Coast Redwood Co. to a Mr. Hull, who paid appellant \$925,000 in cash prior to taking possession of the sawmill in April, 1951. Mr. Hull was unable to make the installment payments required by the agreement of sale and appellant resumed control of these assets in December, 1951. When questioned as to the disposition of the money received from Mr. Hull, appellant stated that it was used "to pay bills and get the property in shape where we could deliver it to Mr. Hull when the time came." [Tr. 668.]

meeting its obligation to pay over withheld income and Social Security taxes to the Government as long ago as 1947 and 1948. Again, at the start of the indictment period (namely, April 1, 1952), Coast Redwood Co. was delinquent in the payment of prior withholding taxes. Pursuant to an understanding reached with the Internal Revenue Service, it was paying off these past obligations at the rate of \$1,000 per week. The sums paid during the indictment period were credited seriatim to the oldest outstanding obligation, in accordance with existing Internal Revenue Service policy where no instructions to the contrary are given. Neither Coast Redwood Co. nor appellant requested or instructed that the sums be applied in any different manner. Accordingly, the monies paid over to the Government during the indictment period, with the exception of the partial third quarter payment, served only to diminish prior obligations and not to pay current liabilities. However, it should be observed that payments made during each quarter of the indictment period and applied to accrued obligations did not in any instance equal or exceed the amount of money withheld and not paid over during that particular quarter.⁶

Appellant has resolutely maintained from the inception of the investigation into Coast Redwood

⁶An aggregate amount of \$87,973.00 was paid over to the Collector of Internal Revenue during the indictment period, of which the sum of \$28,919.05 was applied, as noted previously, to the third quarter liability and the balance of which was credited to back taxes which accrued prior to the commencement of the indictment period.

Company's tax situation that the failure to pay the tax obligations on time was ascribable to the lack of sufficient funds. It was not that Coast Redwood Co. never had adequate funds to meet its tax obligations. The corporation's books and accounts completely refute such a contention. Coast Redwood Co. kept two bank accounts which during each month of the indictment period reached substantial credit amounts, although, it must be added, the general over-all state of these accounts was one of constant overdraft.⁷ It was rather, appellant claims, that Coast Redwood Company's financial resources were so severely drained by the business setbacks it was experiencing in 1952, and it was so beset by other pressing obligations and impatient creditors that it was not possible to pay the Government in full if the corporation was to survive. Consequently, as appellant depicts the scene, Coast Redwood Co. was confronted with a continuing perplexing problem arising from the described predicament—who shall be paid and how much?

Appellant was chief executive officer of the corporation. It was his responsibility to determine how

⁷Coast Redwood Company's bank accounts can most accurately be characterized as active and fluctuating. The following example vividly illustrates the dynamic state of the corporation's bank accounts. Its commercial account at the Arcadia Branch of the Bank of America showed a balance of \$921.44 on August 8, 1952. The next day the balance was \$18,816.85. And on August 11, 1952, the account showed that \$20.76 was overdrawn.

corporate funds should be expended. He was not himself the "disbursing officer" for the corporation, but he had the final word as to what bills should or should not be paid, and when. Possessed of such authority and power, he came within the purview of Section 2707(d) of the I.R.C. of 1939, which defines a "person" subject to the preceding subsections of § 2707.⁸ Appellant asserts that his choice was highly circumscribed. He says he could have paid the Government in full and neglected most of the other creditors entirely. Had he done this, appellant submits, Coast Redwood Co. would have been forced to shut down. He could have apportioned payments of available funds to various creditors, including the Government, and continued in business. Appellant states that he wanted to remain in business, expected and hoped to extricate Coast Redwood Co. from its embarrassed financial status, and planned to pay off all creditors in full. Of course, attainment of his related objectives lay with

⁸Section 2707(d) provides as follows:

"The term 'person' as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Appellant does not contest on this appeal the sufficiency of the evidence to support a finding that this provision applies to him. Cf. *Levy v. United States*, 140 F. Supp. 834; *Cushman v. Wood*, 56-2 USTC 9690 (1956); *Wade v. United States*, 54-2 USTC 49,066 (1954).

the latter alternative, which appellant therefore chose to pursue.

In order to stay in business, Coast Redwood Co., according to appellant, had to pay its current trade obligations such as payroll, suppliers, log haulers, insurance, and other similar operating expenses. Otherwise the necessary services rendered by this group of creditors would not have been forthcoming. Accordingly, appellant ordered that these obligations be accorded top priority. An Internal Revenue Service agent quoted appellant as later saying that he was, in effect, robbing Peter to pay Paul and the United States was Peter in this instance. The agent testified that appellant also admitted that the Government rated a low priority. Appellant does not deny that the Government was not given first preference but urges in justification of his policy that he was at all times trying to do what he thought most likely to assure preservation of the corporation and eventual payment in full to all creditors, including the United States.

Wilson did not seek to conceal his policy or Coast Redwood Company's actual tax liability from the Government. Throughout the indictment period Coast Redwood Co., under appellant's stewardship, filed full, accurate and timely tax returns reflecting the amount of money owed. Appellant acknowledged, and never disclaimed, Coast Redwood Company's tax liabilities. He simply refused to direct their payment.

The operations of Coast Redwood Co. were considerable in scope and volume. During the indictment period its gross receipts totaled \$2,412,635.00 and its total disbursements amounted to \$2,414,263.00. As heretofore noted, Coast Redwood Company's business activities were conducted principally with affiliated corporations. Many of the expenditures and receipts during the nine-month period covered by the indictment involved these affiliates. The inter-corporate dealings and transfers of funds from one entity to another were numerous and complicated. Counsel for both sides devoted much attention and placed much emphasis upon whether these dealings and transfers constituted an affirmative attempt to siphon off available funds to affiliates, and were designed by appellant to evade and defeat the payment of the tax obligations. No useful purpose would be served by encumbering this opinion with compilations of these myriad transactions in light of our disposition of this appeal and the grounds therefor. It suffices to say that the original set of figures shows a net inflow to Coast Redwood from these dealings; the adjusted journal entries indicate a net outflow resulted from these transactions. A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for nonexistent brokerage fees on log cants sold to it, it is

also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.

Appellant supports various payments made to affiliates in preference to clearing up the tax obligations on the ground that these payments and in some instances, loans, were necessary to keep the other corporations solvent, and that in view of the interrelationship between his various corporations it was essential to Coast Redwood Company's continued existence that the affiliates remain in business. It should be noted here that the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family. Appellant drew no salary during the indictment period and the corporation never declared or paid a dividend in its ill-fated lifetime.⁹

It should be noted also that appellant's version of Coast Redwood Company's dire financial condition and consequent dilemma, especially the assertion that preservation of the business rested on non-

⁹Two Coast Redwood Co. checks were drawn to the order of appellant during the indictment period. The first was a \$1,000 check drawn in October, 1952, by an employee acting apparently without appellant's knowledge and consent. It was restored to Coast Redwood Co. the next month. The second was a \$19,000 check issued on November 28, 1952. The sum represented by this check wove a tortuous path through appellant's many corporate entities, but did not come to rest in his account. The sum was transferred to the account of A. K. Wilson Lumber Co., which treated the transaction as a Transfer of

payment of the tax liabilities, was challenged by the Government and apparently disbelieved by the court below. The District Court was seemingly of the opinion that appellant's explanatory statements, self-serving in character, were not persuasive because the tax obligations represented a mere pittance in the over-all financial dealings of the corporation. Of course, the trier of fact was free to discount appellant's testimony and no error was committed thereby. Appellant's defense has been here considered at length, not to permit an appellate tribunal to "second guess" a trial court on a factual issue, but to highlight the especial significance of the constituent mental element of the offense under the circumstances of the instant case.

Another facet of the instant fact situation deserves mention. Appellant and representatives of the Internal Revenue Service conferred from time to time during the indictment period regarding the matter of Coast Redwood Company's tax delinquencies. Invariably these conferences culminated in a

funds from Coast Redwood Co. to Union Bond, and from Union Bond to A. K. Wilson Lumber Co.

The Government also sought to establish that appellant was depleting the funds of A. K. Wilson Lumber Co. and thus indirectly siphoning Coast Redwood Co. funds. The basic premise of the Government's charge is that funds were transferred from Coast Redwood Co. to A. K. Wilson Lumber Co. or A. K. Wilson Lumber Co. refused to pay its obligations to Coast Redwood Co. for tax evasion motives. Consequently, the textual discussion covers this point.

promise by appellant that the corporation would, among other things, make regular installment payments of a certain sum or would settle its tax liabilities by a certain date. Just as invariably, for one reason or another, Coast Redwood Co. never fulfilled its undertakings. Nevertheless, the Internal Revenue Service acquiesced repeatedly in the delays and refrained from seizing the corporation's property in the hope that the business could be preserved; the same hope appellant urges was motivating him. Unfortunately, appellant's expectation proved groundless and his hopes were dashed. Coast Redwood Co. collapsed and was ultimately adjudicated a bankrupt. Had events taken a different turn, this case might not be before us.

We turn now to a consideration of the statute. Section 2707(c) provides as follows:

“Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony * * * (penalties omitted) * * *”

Since appellant both collected and accounted for the withheld monies, conviction under this section can be predicated only on the wilful attempt to evade or defeat the payment of the taxes.

The conduct rendered felonious by § 2707(c)—the wilful attempt to evade or defeat the payment of taxes—contains two constituent elements. They are a particular subjective state of mind—“wilful”—and certain objective activity carried on pursuant to such mental state—“attempt to evade or defeat the payment of the taxes.” They must co-exist to constitute an offense. In other words, the defendant must have wilfully engaged in the attempted evasion.

The District Court took the position during the course of the trial that the knowing and intentional disbursement to others of funds withheld from employees for payment of income and Social Security taxes constituted an offense under § 2707(c). Under this view the Government was required to prove only that appellant was cognizant of the tax obligations, that corporate funds were physically available for their payment, and that appellant intentionally chose to divert these funds to other uses. The motivation and purpose which governed the distribution of funds were deemed immaterial. Appellant asserts that this approach misconceives the requisite mental element of the crime and that it was incumbent upon the prosecution to prove that an evil motive or bad purpose controlled appellant's direction of the disbursement of Coast Redwood Company's funds.

To fully comprehend the nature of the conduct condemned by § 2707(c), it is necessary to examine the section in the statutory framework in which it

appears. § 2707(c) is the apex of a series of penalties for assorted violations of the internal revenue laws. § 2707(a) prescribed a 100% civil penalty for wilful failure to pay, collect, or truthfully account for and pay over certain taxes and for wilful attempt to evade or defeat the tax or its payment. And § 2707(b) makes it a misdemeanor to wilfully fail to pay a tax covered by this subsection, make returns required by law, keep such records as are required by law, or to supply such information as is required by law. Subsections (a), (b), and (c) all required that the person act wilfully in failing to perform his statutory duty.

However, the term "wilful" is not defined in the statute. Nor does the legislative history afford illumination on this point. We move thence to the decisional law on the definition of this term. The word "wilful" is susceptible of many meanings. Its interpretation is frequently influenced by its context. It may mean one thing in civil cases and quite another thing in criminal prosecutions. When used in criminal revenue statutes, it has generally been construed to mean an act done with evil motive, bad purpose, or corrupt design. *United States v. Murdock*, 290 U.S. 389; *Spies v. United States*, 317 U.S. 492. The *Spies* case, a landmark decision in this area of law, involved a felony conviction for attempted income tax evasion under Section 145(b) of the I.R.C. of 1939. The Supreme Court, in reaffirming the traditional notion of the mental element required for criminal conviction for non-payment of taxes, declared:

“The difference between wilful failure to pay a tax when due, which is made a misdemeanor, and wilful attempts to defeat and evade one, which is made a felony, is not easy to detect or define. * * * It (wilful) may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of wilfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no wilful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect wilfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.” 317 U.S. at 497-8. [Emphasis added.]

The Supreme Court’s precise holding in the Spies case was that the District Court erred in refusing to give a requested instruction that if the jury found only that defendant had wilfully failed to make a tax return and wilfully failed to pay the tax due, then it could not find the defendant guilty of a wilful attempt to defeat and evade the income tax. Section 145,¹⁰ dealing with income taxes, is

¹⁰26 U.S.C., § 145.

analogous, and phrased similarly, to section 2707. Both statutes draw a distinction between the wilful failure to pay a tax, which in each instance constitutes a misdemeanor, and the wilful attempt to evade or defeat the payment of a tax, which in each instance, is a felony, a distinction which, the Supreme Court readily conceded "is not easy to detect or define." 317 U.S. at 497. The Court held that the difference between the two kinds of prohibited conduct is that the word "attempt," as used in the felony section, denotes an affirmative act of evasion rather than a wilful omission designed to evade the tax. The mere wilful failure to pay, without more, could constitute no more than the misdemeanor.

The Supreme Court noted that Congress had used the comprehensive phrase "in any manner" in stating the modes by which a wilful attempt to evade and defeat a tax might be achieved. It then listed "by way of illustration, and not by way of limitation" some of the more common methods of attempted evasion, "such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct, the Supreme Court stated, "The offense may be made out even though

the conduct may also serve other purposes such as concealment of other crime." 317 U.S. at 499.

The unusual facts of the case at bar do not reveal the common examples of badges of fraud set forth by the Supreme Court. Of course, the phrase "in any manner" covers novel and unusual as well as common methods of evasion, for it is all-inclusive. *United States v. Gordon*, 3 Cir., 242 F. 2d 122; Rothwacks, *Law and Procedure in Criminal Tax Prosecutions*, 26 *Taxes* 797 (1948). Consequently, the diversion of available funds to affiliates and other creditors in preference to payment of Government obligations qualifies as an affirmative act under the statute and would warrant conviction if done with the requisite state of mind.

It would appear that the well-settled rule of statutory construction that statutes dealing with the same general subject matter are to be construed in *pari materia* is applicable, and that the *Spies* decision is determinative of the content of the subjective element required by section 2707(c).¹¹ There appears to be but a single salient difference between sections 145(b) and 2707(c). It is that the former deals with the defendant's taxes, while the latter involves taxes owed by others and withheld for payment to the Government. These latter tax funds constitute "a special fund" held "in trust" by the employer. Section 3661, I.R.C. of 1939. The District Court

¹¹See *Hawkinson v. Comm. of Internal Revenue*, 2 Cir., 235 F. 2d 747.

felt that the deliberate disbursement of monies held in a fiduciary capacity "which didn't belong to the defendant" is sufficient, in itself, to support a conviction under § 2707(c). Thus, it would be enough if proof was adduced that the defendant intentionally and knowingly acted in a manner which resulted in non-payment of the taxes and it is not essential that the acts were in fact done for the purpose of evading or defeating the payment of the taxes.

Is this distinction between ordinary taxes and so-called "special fund" taxes justified?

We cannot find support for such distinction in either the statute or the adjudicated cases arising thereunder. It is true that a difference exists in respect to the capacity in which the tax monies are held. But the duty to pay is the same in both instances, as is the effect of non-compliance. It may well be that the capacity in which the monies are held exposes the defendant to the risk of additional penalties for non-payment of taxes,¹² but there is

¹²One such additional obligation for the breach of which there is a concomitant penalty is the duty to account and pay over the monies, as provided in Section 2707(c). The conclusion that the capacity in which the funds are held does not alter the content of the subjective element of a felonious attempt to evade or defeat the payment of a tax is buttressed by the provisions of Section 3661 of the Internal Revenue Code of 1939. It provides that:

"Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the

nothing in any revenue statute which would alter the subjective element of felonious tax evasion because of the capacity in which the funds are held. It would require a clear manifestation of Congressional intent that the Internal Revenue Code should be construed to set up one rule for "special fund" taxes, and another rule for income taxes, before we could so hold. We cannot find the semblance of such Congressional intent.

The conclusion that the capacity in which the funds are held does not provide a basis for modifying the traditional subjective element of tax evasion is borne out by the cases decided under other subsections of 2707. In *Yarborough v. United States*, 4 Cir., 230 F. 2d 56, the Fourth Circuit affirmed a misdemeanor conviction under 2707(a) for wilful failure to file income and Social Security taxes withheld from the wages of employees. The jury was instructed in that case that wilful means bad purpose, evil motive, or lack of justifiable excuse. The civil cases arising under § 2707(a) also recognize

United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

Thus, the second sentence, in terms, refutes the notion that "special fund" taxes are a novel breed of tax to which the traditional criteria of civil and criminal responsibility are inapplicable.

that criminal liability depends upon proof of evil motive or bad purpose. *Levy v. United States*, 140 F. Supp. 834; *Nugent v. United States*, 136 F. Supp. 875; *In Re Haynes*, 88 F. Supp. 379; and *Paddock v. Siemoneit*, 218 S.W. 2d 428, 7 A.L.R. 2d 1062. These cases hold that it is enough to warrant imposition of the civil penalty that the defendant's actions were knowingly and intentionally taken. See also Rev. Ruling 54-158, 1951-1 Cum. Bull. 247. Compare *Kellems v. United States*, 97 F. Supp. 981, and 50-2 USTC at 9489 (1950), and *Cushman v. Wood*, 56-2, USTC at 9690 (1956), holding that mere intentional failure to pay is not even sufficient for civil purposes.

The oft-cited opinion in *Paddock v. Siemoneit*, *supra*, states that the term "wilful" in criminal tax statutes refers to motive or purpose whereas in the civil statute it characterizes intention and knowledge. The facts of that case closely parallel the instant factual situation. There it was held that the president of a corporation was civilly liable for the corporation's failure to pay withheld taxes where the reason for non-payment was that the corporation was in precarious financial condition and the withheld funds were employed to preserve the corporation. Here, too, the evidence is certainly sufficient to support a finding that the failure to pay was intentional and that the defendant was responsible for such failure. But that is not enough to justify a criminal conviction. To warrant imposition of the heaviest of penalties assessable for

non-payment of taxes, the principal purpose of all such penalties being compliance, it must also be found that the defendant's conduct was prompted in part at least by tax evasion motives. This the trial court did not do.

The trial court's conception of the requisite subjective element under § 2707(c) was voiced at length during the progress of the trial and was reiterated in comments which accompanied the formal verdict. Of course, as those experienced in trial matters know full well, it is a hazardous and risky business to place too much reliance upon comments emanating from the bench during the course of a trial. The strained atmosphere of the trial arena, and the lack of opportunity for careful, studied consideration of the problem, is not conducive to dispassionate, deliberate and definitive comment. An able and alert trial judge, responsive to his responsibilities, will frequently intersperse questions and clarifying comments during the trial to clarify troublesome points, elicit certain evidence or state tentative views. Litigation would never be terminated if appellate courts seized upon isolated remarks of trial courts to award new trials. See *United States v. Wain*, 2 Cir., 162 F. 2d 60, 65. However, there are cases where the trial court's views are set forth with certitude and clarity. This is such a case. To disregard these clear statements of the court's views, as expressed on numerous occasions, is to ignore reality. The most significant of these comments are set

forth below.¹³ A thorough grasp of them is indispensable if the problem which faces this court is to be fully comprehended.

¹³The first full exposition of the trial court's approach to the subjective element required to be proved under § 2707(c) came during argument by appellant's counsel, Mr. Avakian, following the presentation of the Government's case-in-chief, on the motion for judgment of acquittal. After Mr. Avakian had set forth his conception of the essential elements of the offense and related them to the instant facts, he was queried as follows:

“The Court: Do you think that there is any difference with respect to this argument as between the payment of the taxpayer's own taxes and withholding taxes?

“Mr. Avakian: I don't think so, your Honor.

“The Court: I see the force of your argument and if this were a case that involved the taxpayer's own taxes—income taxes, we will say—and the full disclosure by return of the amount due, and then the handling of his business in the manner that the records here disclose that it was handled, then I see the force of the argument as to the principles that have been laid down by the courts with respect to wilfulness and acts of commission and like matters that would probably defeat a criminal charge. I am wondering whether or not there was any difference in the application of that argument in the case of taxes of someone else that the employer is required to withhold and pay, whether there is any difference there. Is the use of the trust fund, so-called—they have been described as trust funds to rather loosely designate them—but does the use of the trust funds themselves give rise to an inference to wilfulness as an act of commission as differentiated from the case of the taxes due by the taxpayer himself? There is a novelty here in the application of that rule that you speak of. I was wondering if you had any thoughts concerning that.” [Tr. 557.]

That problem is what effect should the trial court's failure to apply the proper standard of the

The Court continued to express the same idea.

"The Court: It seems to me that that is the bigger question, as to whether or not this doctrine which you speak of (the Spies decision) applies to a withholding tax case, and that presents a little different question than is presented in these decisions." [Tr. 564.]

Finally it turned to conviction. We trace that development:

"The Court: It doesn't make any difference whether or not in using that money that the taxpayer got more money from affiliated companies than he paid out. I don't think it can stand or fall on that at all.

"Mr. Avakian: I think it is important in this respect, your Honor: Not only must there be the wilful acts of commission, but they must be done with the specific evil intent of defeating the payment. Now, that is where I think it becomes material to know whether there was a net inflow rather than an outgo because that throws light on whether there was necessary evil intent, and it is in that respect that I think it is significant to know what the flow of funds was, because if there were only a factual showing of a knowing and intentional use of these funds for some other purpose, that would not be enough. There would also have to be evidence which would support the inference and the finding that that conduct was done for the purpose of defeating the payment of the tax. That's the distinction, of course, between this type of statute that the Spies and Murdoch cases talk about, wherein the administration of those revenue laws, the penalty is imposed for violation of them but there must be a showing of an evil or bad motive and that good faith is a defense to the charge. Now, that's where I think the flow of funds becomes material.

"The Court: I think that what you said is a perfectly logical conclusion to be drawn from the prin-

subjective element under § 2707(c) have upon the disposition of this appeal?

ciples of the Spies case in connection with income taxes due from a taxpayer. In other words, it would be necessary to show some affirmative action with an evil motive to use the property of the taxpayer which would be available for the payment of taxes or his monies for the purpose of defeating the purposes of those taxes. If he used his property in connection with the normal activities of his business and they proved to be untruthful or he misjudged the consequences of it, he lost it, he was thus unable to pay his taxes, of course, it wouldn't be the kind of motive that is required to prove violation of the statute. That is why it is in order to draw the line between those acts, that philosophy that we have long ago got away from, that you imprison people for debt. As Justice Jackson said in the Spies case, there has to be some affirmative act of fraud to show that something was done with the property or assets or money of the taxpayer for the deliberate purpose of evading the payment of the taxes due.

“However, the question becomes, it seems to me, somewhat different when you come to the withholding taxes under this statute because there it may be very properly said that the mere act of using this money which doesn't belong to the taxpayer at all—the money that he has, that he owes for his own taxes, that is his own money, and, of course, there you have to go much further in order to develop a criminal charge and that's the reason for that philosophy that is expressed in the Spies and those other cases. But the question here is this was not his money. This was money that was due somebody else, but which the law imposed upon him an obligation to hold and pay the United States.

Now, the question is under the circumstances of this case of the non-payment of these monies and the obvious use of them, whether the use of the money was well intentioned or not, in the hope of

There is surprisingly little authority respecting the question of the effect upon a conviction of a trial court's misconception regarding an essential element of the offense in a non-jury case. Indeed, we

making some of the enterprises work out and so forth, that the use of that money under those circumstances was a bad motivated act. And that, it seems to me, is the rather simple question that it boils down to. Of course, none of these questions are simple but it is a rather simple question to which it boils down. I don't think that it is necessary to show bookkeepingwise what the net balance was with respect to these transfers, but whether or not under the circumstances of these various corporations and companies, whether or not the use of that money under those circumstances constitutes the affirmative act that makes up the violation of the statute. And that is a bigger question, it is a broader question. All the circumstances of the case have to be taken into account, except that I don't think that what the outcome bookkeepingwise of the transactions is has anything to do with it. It is whether or not the act of using that money in connection with these various corporations is a wilful act under the circumstances, it was done knowingly, it was done consciously, all the circumstances that make up the act of withholding and non-payment, whether the circumstances surrounding that justified a conclusion that that act of non-payment and use, irrespective of what the result of it, constitutes a wilful act, that I think is the question in this case * * *”
[Tr. 568-571.]

Mr. Avakian continued to urge that there was no evidence that any transfer of corporate funds was attributable to evil motivation. The trial court's reply, clearly delineating its views, follows:

“The Court: But I don't think that has anything to do with it. You are basing that upon the point that you raise that the government has to

find no direct authority. However, analogous decisions involving jury cases and several basic principles of criminal law furnish clear guideposts to a resolution of this issue.

prove that the means used were with fraudulent intent. I couldn't agree with you on that, that there had to be proof by the fact of inference that any step that was taken in connection with the matter in itself, that particular step, had to be taken with the evil motive and intent to defraud the government. I couldn't follow that because we have those questions constantly raised in conspiracy cases, for example, that the particular act itself in itself may be of an innocuous nature but if it furthers the purpose of some person who is pursuing some unlawful purpose it is in itself admissible and may be considered as an overt or an act done pursuant to a purpose which is against the law. So that I don't think that it has to be shown that a particular transfer out was with that intent; I don't think that that is necessary." [Tr. 579.]

During the argument to the court which preceded the rendition of the verdict, the trial court had occasion to reiterate its views. As is readily discernible no change had occurred in respect to these views throughout the presentation of the defense.

"The Court: I don't attach any particular importance to these so-called in-and-out transactions. I think I mentioned that once before in the trial of the case.

"I think the District Attorney (sic) did make some contention to that effect, but I don't think it is of any importance in the case as to whether there is any evidence of any concealment or transfer of assets as such for the purpose of evasion of tax." [Tr. 925.]

And again:

"The Court: Well, except that this is a withholding tax case and it is not a tax of the defendant

Initially it should be noted that we are not concerned with such matters as the admission or exclusion of evidence or rulings on non-merit defenses. In such cases appellate courts often invoke the rule applied to civil judgments that if any valid basis

that is involved. With respect to these taxes, the defendant is merely the collecting agent or trustee collector for the government.

“Mr. Avakian: Well, in terms of the origin of the obligation, of course, that is true. But in terms of the offense that is defined in the statute, I don’t think it matters what kind of tax it was, and moreover——

“The Court: Except that the instances or facts that go to make up evasion of payment are different in cases of withholding taxes than they would be with respect to the defendant’s own taxes.” [Tr. 935-6.]

The Government contends that the comments accompanying the formal verdict show that regardless of remarks voiced during the course of the trial the verdict itself was grounded upon a correct conception of the governing law. We cannot agree. On the contrary, these comments, relied upon by the Government as the strongest expression of the applicable law made by the trial court, seem rather to reinforce the belief that a too stringent state of mind standard was applied herein. The key paragraph of those comments follows:

“I am satisfied that the evidence shows beyond question that the defendant here knowingly and deliberately set and followed a course of so operating the business of Coast Redwood Company, Inc., as to advantage himself and his companies by the use of the withheld employees’ taxes; and that such course of conduct affirmatively constituted wilful evasion of payment of these taxes. This he did with full knowledge and awareness of the nature of his course of conduct and of its consequences.” [Tr. 963.]

exists for affirming the action taken below, such action will be affirmed regardless of the particular ground upon which the original decision was rested. *Wagner v. United States*, 9 Cir., 67 F. 2d 656. That rule is sound and salutary and it furthers not only the ends but also the administration of justice where the erroneous theory worked no hardship nor harm upon any party.

But we are not dealing with a mere error of law occurring during the course of trial and which can be disregarded as harmless. Involved here, (if we are right) is a basic misconception of an essential element of the crime charged against appellant, which in truth is the critical element under the facts. We believe therefore that the comparable and controlling decisions are those jury cases involving the related question of erroneous instructions. If this case had been tried to a jury and the comments voiced by the learned trial judge had taken the form of jury instructions, a conviction obtained thereunder could not stand under the principles enunciated in the *Murdock* and *Spies* decisions. Is there any difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and in effect instructing himself similarly in a non-jury case?¹⁴ We think not. In each instance a conviction has resulted from the application of im-

¹⁴Cf., Rule 75(g), Rules of Civil Pro., 28 U.S.C.A.; *Mar Gong v. Brownell*, 9 Cir., 209 F. 2d 448 (1954); *Takehara v. Dulles*, 9 Cir., 205 F. 2d 560 (1953).

proper standards of law to the facts by the trier of fact. Such a case, we believe, compels reversal of the conviction.

It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in response to such a contention,

“It may not be amiss to remind that the question is not whether guilt be spelt out of a record but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in federal courts.” *Bollenback vs. United States*, 326 U.S. 607, 614-5.

The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. *Pearson vs. United States*, 6 Cir., 192 F. 2d 681; *People vs. Bigley*, 35 N.Y.S. 2d 130; *People vs. Roper*, 259 N.Y. 170, 181 N.E. 88; *People vs. Hewlett*, 138 CalApp. 2d 258, 239 P. 2d 159; 24 C.J.S. Criminal Law § 1834, p. 676.

It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria. But the significance of this matter is all the more accentuated in a factual context where the question is a close one. This is that type of case. It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by a desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by § 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under § 2707(a). All these possibilities exist.

Whether particular conduct is “willful” is, of course, a question of fact.¹⁵ By its very nature, it is not generally amenable to direct proof and must be shown by circumstantial evidence.¹⁶ The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained. But the verdict must be rendered under proper and applicable rules of law.

¹⁵*Gaunt v. United States*, 1 Cir., 184 F. 2d 284; *Himmelfarb v. United States*, 9 Cir., 175 F. 2d 924.

¹⁶*United States v. Commerford*, 2 Cir., 64 F. 2d 28; *Capone v. United States*, 7 Cir., 51 F. 2d 609.

Another point requires discussion. Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule 23 of the Federal Rules of Criminal Procedures. *Cesaro vs. United States*, 1 Cir., 200 F. 2d 232. No such formal request was made in the instant case. However, counsel for appellant repeatedly called the trial court's attention to this matter, and, as indicated previously, the trial court's remarks at the time of verdict bore on it. Moreover, counsel for the Government did not raise the point of Rule 23 on this appeal. Therefore, while we believe resort to Rule 23 ordinarily must be made to preserve such an issue on appeal, we also believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.

The other question tendered by this appeal relates to the exclusion of certain evidence, i.e., that appellant, through his attorney, had negotiated and entered into an understanding and agreement with representatives of the Internal Revenue Service in Portland, Oregon, in May, 1955, whereby certain assets were to be sold to pay off Coast Redwood Company's tax obligations. The District Court took notice of the fact of the negotiations and understanding. It refused to allow the attorney to testify

as to the details on the ground that such evidence was immaterial.

The trial judge possesses wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion. The evidence offered went to the defendant's state of mind. It concerned actions taken over three years after the indictment period commenced and its probative value, if any, was slight. We cannot hold under the circumstances that the trial court abused its discretion in excluding the details of the negotiations as distinguished from the fact thereof.

~~The judgment of conviction is reversed and the case is remanded to the District Court for retrial in accordance with the principles set forth in this opinion.~~

“The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.”

Reversed.

[Endorsed]: Opinion, Filed November 14, 1957, as amended by Order of February 27, 1958.

/s/ PAUL P. O'BRIEN, Clerk.

[Title of Court of Appeals and Cause.]

ORDER MODIFYING OPINION AND DENY-
ING PETITION FOR REHEARING

Before: Denman, Circuit Judge; Pope and Barnes,
Circuit Judges.

The last paragraph, before the word "Reversed," contained in the opinion of this Court, filed November 14, 1957, is stricken, and the following paragraph substituted therefor:

"The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

We consider "Appellee's Petition for Rehearing en banc as a petition for rehearing and a suggestion (in accordance with our Rule 23) that the case be reheard en banc. With the modification of the opinion as set forth hereinabove, the petition for a rehearing before the Court as constituted for the hearing of the appeal is denied. The suggestion for rehearing en banc is rejected.

/s/ WILLIAM DENMAN,
Circuit Judge;

/s/ WALTER L. POPE,
Circuit Judge;

/s/ STANLEY N. BARNES,
Circuit Judge.

[Endorsed]: Filed February 27, 1958.

United States Court of Appeals
for the Ninth Circuit

No. 15301

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for

reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

Filed and entered November 14, 1957, as amended by Order Filed February 27, 1958.

[Title of Court of Appeals and Cause.]

ORDER ON PETITION FOR REHEARING
AND PETITION FOR RECALL OF MAN-
DATE AND FOR LEAVE TO FILE PETI-
TION FOR REHEARING

Before: Denman, Pope and Barnes, Circuit
Judges.

Counsel urge a rehearing, and a recall of our mandate herein dated March 7, 1958, in order to allow such a rehearing. Three cases are cited in support of this position: *United States v. Shotwell*, 1957, 355 U.S. 233; *Lawn v. United States*, 1958, 355 U.S. 339; and *Mesarosh v. United States*, 1956, 352 U.S. 1.

United States v. Shotwell, *supra*, was a case where defendant was convicted by a jury. The issue remanded had to do with a preliminary question relating to the admissibility of evidence and did

not relate to an issue submitted to a jury. Obviously, had it so related, no partial remand to the District Court would have been possible. But in *Shotwell*, the District Court judge was authorized to take evidence upon the issue of admissibility of other evidence introduced at the previous trial to make appropriate new findings of fact on that issue, and a new final judgment on that issue.

In *Lawn v. United States*, *supra*, it is true the minority, speaking through Mr. Justice Harlan, thought the issue of whether “untainted” duplicates of the “tainted” check and stub were in the hands of the New Jersey Federal authorities should be remanded to the District Court by “partial remand;” while the majority of six thought this action unnecessary because of the lack of any objection to the evidence entered by defendant’s counsel at the trial. But we emphasize that the majority thought such partial remand unnecessary—nowhere does the majority question the right of the appellate court to order such a partial remand.

In *Mesarosh v. United States*, *supra*, the majority merely established the rule that had this been a jury trial, we could not properly order a partial remand as to issues passed upon by the jury below (*United States v. Shotwell*, *supra*), although the minority felt under the circumstances there existing such partial remand would be proper.

This was not a jury trial. The partial remand heretofore ordered is proper. 28 U.S.C., § 2106.

Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115.

The petition for rehearing is denied; the petition for recall of mandate is denied.

April 16, 1958.

/s/ WILLIAM DENMAN,

/s/ WALTER L. POPE,

/s/ STANLEY N. BARNES,

United States Circuit Judges.

[Endorsed]: Filed April 16, 1958.

In the United States District Court for the Northern District of California, Southern District
Criminal No. 34803

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR KING WILSON,

Defendant.

PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED FEBRUARY 27, 1958

After waiving a jury trial, Arthur King Wilson was tried between the dates of July 9 and 20, 1956,

and convicted by the Court on six counts of wilfully attempting to evade and defeat the payment of Federal income taxes and Federal Insurance Contributions Act (commonly known as "Social Security") taxes withheld from the wages of employees of Coast Redwood Company, Inc. Wilson appealed to the United States Court of Appeals for the Ninth Circuit, and on November 14, 1957, the judgment of conviction was reversed and the case remanded to the District Court for "retrial," 250 F. 2d 312.

The Government filed a petition for rehearing and a suggestion that the case be reheard en banc. On February 27, 1958, the United States Court of Appeals for the Ninth Circuit entered an order denying the petition for rehearing and rejecting the suggestion that the case be reheard en banc, but modified its prior opinion and remanded the case to the District Court as follows:

"The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

The Mandate was returned by the District Court on March 7, 1958, and the defendant appellant Wil-

son filed a petition for rehearing with the United States Court of Appeals for the Ninth Circuit on the modified opinion which petition was denied by the circuit Court in a written opinion on April 16, 1958, F. 2d

The Government has introduced no further evidence and the defendant has no new evidence to which to respond. Documentary evidence and oral testimony heretofore having been introduced during a nine-day period and the Court now being still sufficiently advised and informed in the premises, without further need of oral argument, makes the following Special Findings of Fact and draws the following Conclusions of Law, pursuant to the order of the United States Court of Appeals for the Ninth Circuit.

Special Findings of Fact

I.

The Offense Charged

The defendant Arthur King Wilson, hereinafter referred to as "Wilson," was charged with violation of Section 2707(c) of 1939 Internal Revenue Code. In the first three counts of the indictment, he was charged with wilfully attempting to defeat and evade the payment of income taxes withheld from the wages of employees of the Coast Redwood Company, Inc., a corporation, doing business in Samoa, California, hereinafter referred to as "Coast," for the second, third and fourth quarters of 1952, "by

failing and refusing to pay income taxes withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to use its funds to pay creditors other than the United States * * *” (R. 5). Counts four, five, and six charged Wilson with “wilful attempt to defeat and evade payment of Federal Insurance Contributions Act taxes (commonly referred to as “Social Security” taxes) for the last three quarters of 1952 by the same means as charged in counts one, two and three (R. 8-12).”

II.

Ownership, Direction and Control of Coast Redwood Company and Affiliated Wilson Enterprises

Wilson, his wife and children, owned all of the outstanding stock of Coast (R. 385-386) and owned the controlling stock in some twenty affiliated corporations. Wilson was the president of Coast and also of the other affiliated corporations, with his wife appearing in the organizations as Secretary-Treasurer (R. 177-178; 457). Wilson’s familiarity

with tax consequences is admitted by his statement to Special Agent Klass that he formed the numerous corporations to derive tax benefit and that when it was advisable or desirable to form a family partnership, he would sometimes liquidate a corporation (R. 458). Wilson was involved in directing the policies and operations of these companies, giving a large portion of his time to the buying and selling of timber (R. 599-600; 661-662). The close control and contact was such that Wilson was either present at the mill or in touch with its operations by telephone and teletype on a day-to-day basis. When not at the mill, a large portion of his time was spent at the A. K. Wilson Lumber Company Office in Compton, California, or at the site of the logging operations in Humboldt County, California (R. 369-370).

Coast purchased its stumpage from Union Bond and Trust Company, hereinafter referred to as "Union," and from the Ah Pah Redwood Company, hereinafter referred to as "Ah Pah." Wilson was president and exercised supervisory control over all these corporations (R. 661-662). The office address of Coast, Ah Pah and Union was the same, namely, 1101 South West Fifth Avenue, Portland, Oregon (R. 218). Coast did not own the timber tracts from which it obtained the logs (R. 597). Union and Ah Pah each owned part of the timber (R. 597-598). Coast had a license from both these corporations to purchase stumpage for \$5.00 a thousand as removed from the woods, with a

minimum payment of \$100,000 per year (R. 216-218; 598-599; 674-675). Ah Pah, a wholly owned subsidiary of International Pulp & Paper Company, was not in the business of logging. Wilson and his family owned a controlling interest of International Pulp & Paper Company (R. 674). In 1952 Coast logged both redwood and fir timber (R. 163-164). The fir was sold on the open market and the redwood was cut into cants and sold exclusively to the A. K. Wilson Lumber Company, hereinafter referred to as "Wilson Lumber" (R. 163-164). Wilson and his family owned all the outstanding stock of Wilson Lumber. Wilson was president, member of the board of directors, and principal officer of Wilson Lumber (R. 180; 387-389; 661).

No contract or agreement was produced to show that Coast had a license to cut timber and remove stumpage from timber tracts owned by Union and Ah Pah other than Wilson's testimony.

III.

Nature of the Business Operations Giving Rise to the Tax Liabilities

During the nine-month period, April 1, 1952, to December 31, 1952, Coast withheld income tax of \$135,587.13 and F.I.C.A. tax of \$11,411.43 from its employees shown on Quarterly Forms 941, but paid over to the United States only \$28,919.05, leaving an unsatisfied liability of \$118,079.51 as follows: (R. 108; 194-197; and Ex. 1 to 6, incl.).

	Income tax withheld	F.I.C.A. tax withheld	Paid with Return
Second quarter, 1952	\$ 49,913.22	\$ 5,559.95	—0—
Third quarter, 1952	44,524.53*	3,807.79	\$28,919.05
Fourth quarter, 1952	41,149.38	2,043.69	—0—
	<hr/> \$135,587.13	<hr/> \$11,411.43	<hr/> \$28,919.05

*Adjustment of \$208.46 not included.

The capitalization of Coast was \$5,000.00 in 1947, and the capitalization of Wilson Lumber was \$1,250.00 (R. 703). Hence, operating capital had to be obtained by loans from Union (R. 675-676). Coast's operations were profitable in earlier years. Although Coast suffered an operation loss for the fiscal year ending April 30, 1952, there still remained a surplus of \$306,433.04 (R. 802).

IV.

Established Patterns of Delinquency and Failure to Pay Over Income Taxes Withheld From Wages of Employees

Coast had a long record of delinquency in the payment of taxes withheld from its employees, extending back to 1947 and 1948 (R. 662-665; 667-670). Coast had from 200 to 250 employees and a gross payroll of \$1,131,743.06 during the period from April, 1952, to December 31, 1952, (Ex. L). In January, 1951, Wilson entered into an agreement with Mr. Cunningham of the Internal Revenue Service to pay the then existing delinquent withholding and F.I.C.A. taxes in weekly payments of \$2,500.00 (R. 666-667; Ex. 49). Wilson sold Coast

and other holdings to a Mr. Hull in April, 1951, and received \$925,000.00 in cash (R. 663-670). Wilson resumed possession of the mill on December 4, 1951, pursuant to agreement with Hull (R. 664-665). Despite having received \$925,000.00 (none of which was returned to Mr. Hull), Wilson used none of this money to pay the delinquent withholding and F.I.C.A. taxes. Wilson stated that he didn't have money to pay the taxes (R. 457-458; 667-670).

Early in January, 1952, Wilson had a meeting with Deputy Collector Quinn relating to the taxes due for the period prior to the sale to Mr. Hull. At that time he agreed to pay \$1,000.00 a week on the delinquent liability (R. 685-686). A withholding tax return for the first quarter, 1952, was filed on April 30, 1952, showing taxes withheld from January to March, 1952, in the amount of \$44,416.44, but no payment was made when the return was filed (R. 109; 118-119; 667-669). As previously stated Coast has received \$925,000.00 from Hull and had a surplus of \$306,433.04 as of this date, April 30, 1952, yet no payment was made with the return when filed (R. 802).

V.

The Affirmative Acts Involved in the Offense of Wilful Attempt to Evade or Defeat Payment of Taxes

The Court finds that Wilson wilfully committed the following affirmative acts with the specific intent to evade and defeat the payment of withholding and F.I.C.A. taxes:

1. Instructions to Paul C. Owens, Office Manager,
Not to Pay Tax

(a) Wilson was well aware that Coast owed the withholding and F.I.C.A. taxes for the second quarter of 1952 and when his office manager, Paul C. Owens, questioned him regarding the payment of the taxes due for this quarter, Wilson told him not to worry about it he would take care of it (R. 224-225). Wilson also told Owens each quarter when the tax payments were due that he would take care of it, namely, the second, third and fourth quarters of 1952 (R. 274-277).

(b) In the early part of July, 1952, another discussion was held with the Internal Revenue Service Personnel, and Coast agreed to make deposits on each payday thereafter. On July 9, 1952, Wilson instructed Owens by letter as follows:

“We should start making deposits in the bank to take care of the withholding and Social Security, commencing with the payroll due tomorrow. These deposits should be made as per the Federal requirements each and every month in the future so we will not be default under the requirements.” (Ex. 35.)

Owens stated that Wilson countermanded the letter (R. 277-278). True enough, on August 4, 1952, a Special Trust Account was opened in the Bank of America, Arcata, California, upon instructions from Wilson (R. 150-154). However, he instructed that no depository receipts should be purchased (as

per Federal requirements). The deposits in this account were not made subsequent to each payday or in the amounts due (R. 196-197; 269). A total of \$28,919.05 was deposited to the Special Trust Account and on Wilson's instruction to Owens no further deposits were made (R. 270). The deposit of \$28,919.05 was paid on the third quarter liability of \$48, 332.32, leaving a balance due and unpaid of \$19,413.27 (R. 107-108; 120-121; Ex. 2).

(c) In the August 28, 1952, agreement with the Internal Revenue officials, Wilson agreed to purchase depository receipts evidencing payment of current withholding taxes on each payday, commencing immediately and that he would furnish current certified financial operating statements (Ex. 33). On Wilson's instructions no depository receipts were purchased or financial statements furnished as per the agreement (R. 267-268).

2. Misleading Statements to the Internal Revenue Service

(a) Wilson made misleading statements to Internal Revenue officials for the purpose of evading the tax payments due. On August 28, 1952, he entered into a written understanding (Ex. 33) providing for payment of \$10,000.00 per week from October 4, 1952, to November 14, 1952, and \$15,000.00 per week until December 12, 1952, on Coast's delinquent withholding and F.I.C.A. taxes. No payments in the agreed amounts were made, although a few payments were made of lesser amounts.

When the payments were due, Wilson made misleading statements to Collection Officer Richardson and Valdi that he was negotiating for a loan or sale of properties valued at \$7,000,000.00 and requested extensions of time within which to put through the prospective sale. The extensions were granted to October 31, November 20, November 28, December 26, 1952, January 9, 1953, and January 31, 1953.

During the trial Wilson introduced no evidence in substantiation of his prior statements to Richardson and Valdi about the sale of the properties. These misleading misrepresentations as to the expectations were placed before the Service officials with regularity on the day preceding the expiration dates as extended from time to time (R. 831-876). In a letter dated January 8, 1953, Wilson advised the Internal Revenue Service as follows:

“Confirming our verbal discussion today, we hereby respectfully request an extension of time to and including January 31, 1953, for the payment of our withholding and Social Security taxes, which are past due. At that time we also expect to pay the fourth quarter of 1952.

It is understood and agreed that no sale, transfer, disposition or encumbrance is to be made of any assets of the Coast Redwood Company prior to the time said taxes are paid, except that we will continue with our lumber

operations * * *; and that in the event payment in full is not made on or before January 31, 1953, it is your privilege to exercise your right to seize and sell all the assets of the Coast Redwood to the extent necessary to satisfy the amount due you." (R. 872 Ex. 52.)

Culminating this course of conduct designed to influence the Internal Revenue Service against taking proper legal action of Coast, Wilson voluntarily filed proceedings under Chapter 11 of the Bankruptcy Act on January 30, 1953, (R. 722-723). This act prevented the Internal Revenue Service from taking any further steps to collect the delinquent taxes by ordinary collection procedures.

Wilson testified that Walter E. Heller Company forced Coast into proceedings under Chapter 11 (R. 627). No evidence was introduced to show that the Walter E. Heller Company had any relationship with Coast and Coast records do not disclose any transactions with the Heller Company. Coast records do not disclose that it owed any money to the Heller Company other than Wilson's self-serving testimony that the Heller Company had warehouse receipts for lumber (R. 625-626-627).

The Court finds that the entry of Coast into proceedings under Chapter 11, without notice to the Internal Revenue Service was motivated by a desire to stop legal proceedings by the Internal Revenue Service thereby evading tax payments.

3. Disbursement of Coast's Funds to Affiliate Family Corporations Rather Than Payment of Tax Liability

Coast's disbursements of \$2,659,488.89 (R. 463-464) from April 1, 1952, to January 31, 1953, were not entirely for business operations. Included were funds disbursed to himself and/or to his controlled corporations in the total amount of \$339,599.75 during the period involved herein as follows:

(a) Coast disbursed to Ah Pah \$81,792.28 during the period April 1, 1952, to December 31, 1952, in payment of stumpage (R. 464-465) but these disbursements were \$25,000.00 more than the value of the stumpage purchased from Ah Pah during the same period. (R. 810-811.)

(b) Coast disbursed \$130,562.47 to Union during the period April 1, 1952, to January 31, 1953, (R. 465) or \$14,000.00 more than Coast received from Union during that period (R. 481). The balance due Union at March 31, 1952, had been reduced by Coast from \$1,233,675.70 to \$165,042.64 at April 30, 1953, (R. 381-382). Coast's books also show disbursements in October, 1952, to Union on Wilson's instructions. Three Coast checks were drawn and diverted directly to Wilson's other enterprises as follows: (R. 179; 231-233; 426-429; 439-442; Ex. 24).

Tungsten & Uranium Corporation....	\$ 600.00
Washington Oil Company.....	1,500.00
Mountain States Uranium.....	1,500.00

Coast had no transactions or dealings of any nature with the foregoing listed companies (R. 232-233; 428-429).

(c) On November 20, 1952, Coast disbursed \$19,000.00 to Wilson which he kept (R. 183-184, Ex. 15). At Wilson's instructions, this check was made payable to A. K. Wilson and deposited in Wilson's personal bank account at the Security First National Bank. (R. 184.) By book entry this was shown as a negative account payable to Wilson from Coast, an obvious attempt to conceal the fact that money was being paid over to Wilson as a loan or advance. By book entry after Chapter 11 proceedings had been instituted on January 30, 1953, (two months later) this negative account payable was applied to Coast against its indebtedness to Union, so that, in effect, Wilson was able to collect, for his family-owned corporation, Union, \$19,000 of unsecured indebtedness owing by Coast to Union, despite the Chapter 11 proceedings (R. 252-253). Coast's records therefore do not show that the \$19,000 was ever returned by Wilson nor is there any evidence that this \$19,000 was paid over to A. K. Wilson Lumber Company as a loan from Coast (R. 792-793; 818-821; Ex. M).

(d) During the period covered by this indictment, Coast's accounts receivable, due from Wilson Lumber for the sale of cants to Wilson Lumber, increased by approximately \$36,000.00, yet Coast disbursed \$107,200.00 to Wilson Lumber on Wilson's instructions (R. 464; 475-476). Actually Coast did

not owe \$107,200.00 to Wilson Lumber and there is no justification to warrant this dissipation of funds to the affiliate family corporation. Wilson and his wife drew a net of \$85,089.00 from Wilson Lumber during the indictment period. Wilson drew a net of \$71,189.00, while his wife drew a net of \$13,900.00 (R. 406-408). These funds were not returned to either Wilson Lumber or to Coast. Thus, part of the \$107,200.00 was indirectly diverted to Wilson and his wife. The Court finds that the above-stated acts were wilfully made for the specific purpose of evading payment of taxes as charged in the indictment.

VI.

Receipts of Coast Were More Than Sufficient to Pay the Taxes

Coast's receipts from all sources for the period April 1, 1952, to January 31, 1953 was \$2,651,921.45 (R. 200-206; 463 and Ex. 44). Each month's receipts were in excess of \$220,000.00. The average of withholding taxes was \$15,000.00 per month (R. 929-932). Deposits to the commercial bank account alone show highest balances ranging from approximately \$20,000 to \$50,000 during the indictment period (R. 131-134; 148-149).

The Court finds that Coast had sufficient funds to timely pay the taxes in question when due.

VII.

Wilson Controlled Coast's Profits

Wilson was able to and did control the book profits of Coast because the bulk of its purchases and sales

were made from and to corporations wholly controlled by Wilson. At Wilson's instructions, adjusting entries were made on Coast's sales to corporations which Wilson controlled. (See, for example, Journal Entry No. 113) made on December 6, 1954, for the year ending April 30, 1953, which reads as follows:

“A charge to the Union Bond for \$323,265.25 and a credit to lumber sales for that same amount with the explanation ‘To record price adjustment per A.K.W. 23,510,204 board feet at \$13.75 sold to A. K. Wilson Lumber Company.’ ” (R. 347-350.)

Not only does the above entry evince the fact that Wilson could and did control profits of Coast, it also records a concealment of the increase in accounts receivable of \$323,265.25 by the fact that this amount was charged against the Coast indebtedness to Union Bond rather than shown as an additional accounts receivable from Wilson Lumber. In other words, this constitutes another example of a payment of an unsecured indebtedness to one of Wilson's corporations ahead of the other creditors who were entitled thereto under Chapter 11 proceedings. A similar entry was made on April 30, 1951, in the amount of \$212,273.22 increasing Coast's sales (R. 259).

Coast also granted Wilson Lumber a 5% discount for nonexistent brokerage fees on log cants (R. 282-283). Wilson thereby reduced Coast's profits by 5% on its sales to Wilson Lumber.

VIII.

Extra Judicial Admissions

Wilson's extra judicial admissions showed that he was tax conscious; that he knew the law and that he was well aware that he was not complying therewith (R. 688-689; 601). Wilson told Special Agent Klass that he knew he violated the letter of the law, but he did not violate the spirit of the law, (R. 456); that * * * he was robbing Peter to pay Paul (R. 457; 498-499); that the corporation was created in order to derive a tax benefit and that the Government rated a low priority (R. 457-458).

IX.

Claimed Fire Loss

The claimed loss due to a fire in August, 1952, was not supported by Coast's records. Coast's records showed no casualty loss from a fire since the cut timber did not belong to Coast until it was removed from the forest (R. 597-599). Coast paid \$5.00 per thousand feet as removed from the forest (R. 217-218).

Wilson stated that business was very good in July and August, 1952, and that was a profitable period for Coast (R. 671-673). During the indictment period, despite the fire, Coast records show that cost of supplies increased only \$2,000.00 (R. 342-343). Additional equipment purchased by Coast amounted to \$1,262.31, and that could not be attributable to the fire (R. 344). The lumber sales were not materially affected (R. 345).

X.

Conclusions of Law

1. The Court has jurisdiction over the parties (and subject matter) in this cause.

2. Section 2707(c), I.R.C. of 1939, under which the accused, Wilson, was indicted, imposes a criminal penalty against “any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, * * * be guilty of a felony * * *”

3. The term “person” appearing in Section 2707(c) is defined by Section 2707(d) as “an officer or employee of the corporation * * * who as such officer or employee * * * is under a duty to perform the act in respect of which the violation occurs.”

4. Wilson was the chief executive officer of Coast and directed the expenditure of its funds.

5. Possessed of such authority and power, he comes within the definition of a “person” as defined in Section 2707(d).

6. Coast had available sufficient funds to timely pay its tax obligations to the Internal Revenue Service.

7. Wilson set and followed a course of operating Coast’s business in order to advantage himself and his various companies by the use of taxes which had been withheld from the employees’ wages. He dispersed funds from Coast to himself and/or his affiliated corporations. Wilson knew and was cognizant

of the tax obligations of Coast. He knew and was cognizant of the fact that Coast funds were available for timely payment of its tax obligations to the Internal Revenue Service. Wilson did the above acts and carried on the above course of conduct knowingly and deliberately for the purpose and with the specific intention of evading and defeating payment of the tax obligations of Coast to the Government as set out in the various counts of the indictment.

8. Wilson attempted to evade and defeat payment of withholding taxes of Coast for the second, third and fourth quarters of 1952 by wilfully, deliberately and knowingly failing and refusing to pay income tax withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to use its funds to pay creditors other than the United States.

9. By the same methods, Wilson wilfully attempted to evade and defeat payment of F.I.C.A. taxes for the second, third and fourth quarters of 1952.

10. It Is Ordered, Adjudged and Decreed that Arthur K. Wilson, defendant, is guilty as charged in Counts 1-6 of the indictment.

Dated:

.....,

United States District Judge.

LLOYD H. BURKE,

United States Attorney ;

By /s/ ROBERT H. SCHNACKE,

Assistant U. S. Attorney ;

/s/ ROBERT G. THURTLIE,

Attorney, Office of Regional Counsel Internal Revenue Service, Attorneys for United States of America.

Affidavit of mail attached.

Lodged June 11, 1958.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DEFENDANT'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant objects, as more specifically stated below, to the proposed special findings of fact and conclusions of law submitted by the plaintiff for the reasons set forth in connection with each objection. To avoid unnecessary duplication, the findings proposed by defendant with respect to points cov-

ered in plaintiff's proposed findings to which defendant objects are set forth in conjunction with the discussion of defendant's objections to plaintiff's proposals. References to page and line identify the location of the particular point in plaintiff's proposed findings and conclusions. References to the printed record on appeal are indicated as "R....."

1. Defendant objects to the proposal that the Court make its findings "without further need of oral argument" (page 2, lines 20-21). This trial was conducted almost two years ago, and defendant respectfully submits that the reconsideration of the evidence in the light of the opinion of the Court of Appeals calls for reargument of the case. Defendant hereby requests the opportunity for such argument.

2. Defendant objects to the proposed finding that during the period April 1 to December 31, 1952, Coast Redwood paid over to the United States only \$28,919.05, while withholding \$135,587.13 income tax and \$11,411.43 in social security taxes from its employees (page 5, lines 4-9). While the amount of \$28,919.05 was the total amount which was applied to payment of the tax obligations of this nine-month period, there were additional payments during the period which applied to prior delinquencies in the amount of \$14,054.42 during the second quarter of 1952, \$12,500.00 during the third quarter of 1952, and \$32,500.00 during the fourth quarter, and an additional \$10,000.00 was paid during January, 1953.

(See Exhibits 3, 4, and L.) Defendant requests that the fact of these payments be included in the findings.

3. Defendant objects to the incompleteness of the statement regarding Coast Redwood's operating losses and surplus at page 5, lines 20-21, and requests a more complete finding to the effect that Coast Redwood suffered a loss of \$274,323.95 for the year ended April 30, 1952, as determined by the Revenue Agent (R. 801), and a loss of \$224,099.32 for the fiscal year ending April 30, 1953 (R. 759), and that the surplus on April 30, 1952, was \$306,433.04 (R. 802).

4. Defendant objects to the incompleteness of the proposed findings with regard to the sale to Mr. Hull in April, 1951, as set forth at page 5, line 32, to page 6, line 7, and again at page 6, lines 15-18, of the proposed findings. The uncontradicted evidence is that the sale to Mr. Hull consisted of a portion of the assets of Coast Redwood Company, a portion of the assets of A. K. Wilson Lumber Company, and the stumpage which Union Bond & Trust Company was purchasing from Blue Creek Redwood Company and Sage Land and Lumber Company, and that the \$925,000.00 received from Mr. Hull was used to pay obligations that had to be cleared up in order to be in a position to make delivery of the property to Mr. Hull. (See R. 663-71.) The findings of the Court should so state.

5. Defendant objects to the finding that the existence of "a surplus of \$306,433.04 as of * * *

April 30, 1952" showed ability to pay withholding taxes with the return filed at that time. This accumulated surplus was reflected in the total assets of the company as of that date and did not consist of money. On the contrary, Coast Redwood's books show that there was a total overdraft in its bank accounts on that date of \$45,377.24, taking into account checks outstanding which had not yet cleared the bank (R. 309-10; Ex. H).

6. Defendant objects to the proposed findings that the failure to live up to the terms of the agreement of August 28, 1952, constituted acts of wilful attempt to evade tax. These proposed findings are on page 7, lines 26-32, and page 8, lines 1-9. Such proposed findings are directly contrary to statements made during the trial by both the Court and the prosecutor, as follows (R. 329):

"The Court * * * The defendant cannot be charged criminally with violation of promises under this agreement and I wouldn't consider that in connection with the criminal charge. At this point, at any rate, it seems to me that is extraneous to the criminal charge, as to what the defendant did or did not do in connection with this agreement.

"Mr. Lockley. Your Honor is right, of course, the defendant is not on trial for not having lived up to his agreement. That agreement is in solely for the purpose of establishing his knowledge of the existence of this situation and his knowledge of the requirements of law."

7. For the same reason, defendant objects to the proposed finding that he made misleading statements to the Internal Revenue officials with regard to the promise contained in the "agreement" of August 28, 1952, that he would increase the weekly payments to \$10,000.00 per week on October 4, 1952, and \$15,000.00 per week in November, 1952. Moreover, the Internal Revenue representatives admitted at the trial that they gave successive extensions of time for the increase in these weekly payments, first to October 31, 1952 (R. 864), then to November 20 (R. 865), then to November 28 (R. 867), then to December 26 (R. 869), then to January 9 (R. 870), and finally to January 31 (R. 870-73). On both grounds, therefore, the proposed finding is improper.

8. Defendant objects to the proposed finding that he made misleading statements to Collection Officer Richardson and to Internal Revenue representative Valdi that he was negotiating for a loan or sale of properties (page 8, lines 9-15), and also to the proposed finding that defendant introduced no evidence in substantiation of his statements to Richardson and Valdi about the sale of the properties (page 8, lines 16-18). The latter proposed finding, particularly, assumes that the defendant had the burden of proving that his representations were true, whereas the burden would be on the Government to introduce evidence of falsity in order to support a contention that these were misleading representations. Not only is there a complete absence of any evidence showing that these representations were false, but,

on the contrary, the Court will recall that the voluminous material submitted to the Court through the Probation Officer in connection with the presentence investigation showed that defendant's representations were true, and that extensive negotiations were being carried on during the period in question and had reached the point of the drafting of documents. This is confirmed by the comments of the Court on August 2, 1956, which are attached hereto as Exhibit 1 (pages A and B).

9. Defendant objects to the proposed finding that various acts were committed "with the specific intent to evade and defeat the payment of withholding and F.I.C.A. taxes" (page 6, lines 23-25). Defendant requests that the Court find that the various acts to which that proposed finding relates were done for the purpose and with the intent of keeping Coast Redwood Company in business, and with the knowledge of the representatives of the Internal Revenue Service.

10. Defendant objects to the proposed finding that "on Wilson's instructions no depository receipts were purchased or financial statements furnished as per the agreement" (page 7, lines 30-32). The record reference furnished by plaintiff for this proposed finding (R. 267-68) contains no reference to instructions from Wilson; it shows that the reason for the failure to purchase depository receipts was the insufficiency of money (R. 268); and the witness (Paul C. Owens) stated that he did not know whether or not financial statements had been

prepared and submitted. Moreover, the subsequent testimony of this same witness shows that he had numerous discussions with the Internal Revenue representatives in which he explained that the accounting firm whose certification was required under the "agreement" of August 28, 1952, would not make a certified statement until the Revenue Agent in Portland, who was then making an audit of the returns of Coast Redwood Company, had completed his audit (R. 330-31). This testimony was confirmed by a memorandum made by one of the Internal Revenue representatives on October 13, 1952 (Ex. 51, quoted at R. 879).

11. Defendant objects to the proposed finding that no evidence was introduced to show that the Walter E. Heller Company had any relationship with Coast Redwood, and that Coast Redwood records do not disclose any transactions with the Heller Company (page 9, lines 18-21). The trial record is silent as to what Coast Redwood's records do or do not show in this respect, since only a portion of Coast Redwood's records were introduced in evidence, and there was no testimony as to whether or not the other records (which were and are in the possession of the Bankruptcy Court) showed anything in this regard. The only verbal testimony on the point is the uncontradicted statement of defendant that the Heller Company was financing Coast Redwood on the basis of warehouse receipts (R. 626-27).

12. Defendant objects to the proposed finding

that the commencement of proceedings under Chapter 11 of the Bankruptcy Act on January 30, 1953, represented a wilful attempt to evade the taxes (page 9, lines 11-28). The commencement of these proceedings placed the assets of the business under the jurisdiction of the bankruptcy court. This can hardly be labelled a criminal act of tax evasion.

13. Defendant objects to the proposed finding that Coast Redwood's disbursements during the period in question were not entirely for business operations, and that disbursements were made to himself or to his controlled corporations in the total amount of \$339,599.75 (page 9, line 31, to page 10, line 3). The items making up this total and defendant's objections to the proposed findings in connection therewith are set forth in the succeeding paragraphs numbers 14 to 17, inclusive.

14. Defendant objects to the finding that the disbursements to Ah Pah Redwood Company of \$81,792.28 were not made for business purposes (page 10, lines 4-8). While this total payment exceeded the stumpage purchased from Ah Pah during the same period by approximately \$25,000.00, the excess was in payment of stumpage previously purchased but unpaid for (R. 811, Ex. K). Coast Redwood was removing this stumpage on exactly the same terms as were called for in the contract of Ah Pah Redwood Company with the owner of the timber, Sage Land and Lumber Company, namely, at a rate of \$5.00 per thousand subject to a minimum of \$100,000.00 per year (R. 598-99). Furthermore, in deter-

mining the motive and intent underlying these payments to Ah Pah Redwood Company, consideration must also be given to the stumpage purchased from the other affiliate, Union Bond and Trust Company, and the evidence with regard to that is that stumpage totalling \$70,611.00 was purchased during the nine months in question without any payment whatsoever to Union Bond. Thus, the total payments for stumpage to the two affiliates were \$45,000.00 less than the stumpage received from the affiliates (Ex. I).

15. Defendant objects to all of the proposed findings in subparagraph (b), on page 10, lines 9-21.

(a) The amounts set forth therein are based on an unrealistic and untenable combination of bits of evidence, representing in part subsequent journal entry adjustments of transactions occurring outside the period involved in the indictment. For example, the proposed finding that the balance due to Union Bond was reduced from \$1,233,675.70 on March 31, 1952, to \$165,042.64 on April 30, 1953, implies that Coast Redwood paid Union Bond a net of over \$1,000,000.00 during that 13-month period. But the testimony cited for this proposed finding shows that this reduction was principally the result of journal entries, not of transfers of funds (R. 382-83); and the special agent himself identified one journal entry as a reduction by \$601,857 because of a 1948 transaction and another as a reduction by \$100,692.00 because of a 1951 transaction (R. 509).

(b) The proposed finding that from April 1, 1952, to January 31, 1953, Coast Redwood disbursed \$14,000.00 more to Union Bond than it received from Union Bond is true only on the basis of subsequent journal entries which simply transferred certain amounts from the A. K. Wilson account to the Union Bond account without affecting the combined total of both accounts, as the special agent himself conceded (R. 510-13).

(c) The proposed finding that Coast Redwood diverted funds to three other affiliates, in the total amount of \$3,600.00, is contrary to the evidence, which shows that these amounts were transferred to those affiliates by Union Bond through Coast Redwood's bank account. The evidence shows that on October 22, 1952, Union Bond transferred \$9,800.00 from its account in Portland to Coast Redwood's account in Los Angeles; that on October 22, 1952, Coast Redwood issued its three checks, totalling \$3,600.00, to the three affiliates and recorded these as money transferred back to Union Bond; and that the reason for this was that the three affiliates also had bank accounts in Los Angeles, and Union Bond's employees in Portland made a single transfer of \$9,800.00 for all four companies instead of separate transfers directly to each one. (See Exhibit 16, page 107; Exhibit 17, page 178-79; Exhibit 32, Account 51-1; R. 441, 681.3, 816.)

(d) The actual transactions between Coast Redwood and Union Bond during the nine months in

question are correctly set forth in Exhibit K, and defendant requests that the findings be based thereon. This shows that, prior to the journal entry adjustments made after bankruptcy court proceedings were filed (which concededly did not affect the over-all picture), Coast Redwood received \$151,032.00 in money from Union Bond from April 1 to December 31, 1952, and disbursed \$136,390.00 to Union Bond—a net inflow to Coast Redwood of \$14,642.00. This was in addition to stumpage accruals of \$70,614.00 for which Coast Redwood paid nothing during this period.

16. Defendant objects to the proposed findings in subparagraph (c), page 10, line 22, to page 11, line 5. The contention that the \$19,000.00 check issued by Coast Redwood to defendant on November 28, 1952, represents money transferred to him personally is based on the obviously incomplete memory of an office employee who stated that he did not recall the particular check (R. 183-84, 189-90). It ignores the uncontradicted explanatory evidence subsequently introduced which shows that this \$19,000.00 was deposited in defendant's account contemporaneously with a \$9,000.00 check issued to him by A. K. Wilson Lumber Company; that on the same day defendant issued his check for the total of these two deposits, \$28,000.00, to A. K. Wilson Lumber Company; that the latter treated the receipt of the \$28,000.00 as funds received from Union Bond; and, in short, that defendant's bank account was simply the conduit for a transfer of \$19,000.00 from Coast Red-

wood to A. K. Wilson Lumber Company with the transaction treated, for bookkeeping purposes, as a transfer from Coast Redwood to Union Bond and from Union Bond to A. K. Wilson Lumber Company (R. 790-93, 818-23; Ex. M). Clearly, therefore, there is no basis for the proposed finding that this \$19,000.00 check to defendant was money "which he kept" (page 10, line 23), or that the subsequent book entry applying this to the Union Bond account was for the purpose of giving a preferred status to Union Bond (page 10, line 28, to page 11, line 2).

17. Defendant objects to the proposed findings in subparagraph (d), page 11, lines 6-20. The disbursements of funds from Coast Redwood to A. K. Wilson Lumber Company were a part of a continuing flow of funds in both directions between the two companies, and the \$107,200.00 disbursed to A. K. Wilson Lumber Company was more than matched by the funds which Coast Redwood received from A. K. Wilson Lumber Company. As shown in Exhibit L, Coast Redwood receipts of funds from A. K. Wilson Lumber Company during the nine-month period exceeded by \$198,853.00 the combined lumber sales and cash disbursements to A. K. Wilson Lumber Company. There was not, therefore, any "dissipation of funds to the affiliate family corporation" (page 11, lines 11-12). Furthermore, the proposed finding that \$85,089.00 of Coast Redwood's funds were indirectly diverted to defendant and his wife through their withdrawal of that amount from A. K. Wilson Lumber Company is not warranted by the evidence for

the further reason that Exhibit 43A (one of the ledger sheets of A. K. Wilson Lumber Company showing its accounts with defendant and various affiliated corporations, not including Coast Redwood) shows that these withdrawals were more than matched by the net amounts which the other affiliates paid in to A. K. Wilson Lumber Company during the same period (R. 412-13).

The proposed finding that Coast Redwood's accounts receivable from A. K. Wilson Lumber Co. increased by approximately \$36,000.00 during the indictment period (page 11, lines 6-8) is based on 1954 journal entries adjusting the price of the lumber. This is directly contrary to a specific disclaimer by the prosecutor that he intended to rely on the subsequent price adjustments as evidence of a diversion of funds; and the court itself declared that such matters were not material to the charge (R. 294-9). If these subsequent price adjustments were deemed material, then in all fairness consideration should be given to the fact that appellant was simultaneously having the other affiliates (Union Bond and Ah Pah Redwood) give Coast Redwood a favorable price of \$5.00 per thousand on stumpage with a market value of \$15.00 (R. 598-9, 646, 657). If the stumpage had been sold to Coast Redwood at market value, the additional cost of \$253,966.00 (see Exhibit K, which shows that the stumpage totalled \$126,-983.00 at the \$5.00 rate) would have been approximately equal to the 1954 price adjustments of \$269,-556.73 on the sales to A. K. Wilson Lumber Co.

during the indictment period. The opinion of the Court of Appeals in regard to this whole matter concludes with the observation that

“A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for nonexistent brokerage fees on log cants sold to it, it is also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.”

18. Defendant objects to the proposed finding that the bank account showed highest balances ranging from \$20,000.00 to \$50,000.00 during the indictment period (page 11, lines 25-31). Such figures are only fleeting balances shown on the bank ledger cards and do not reflect outstanding checks. The latter must be considered in determining availability of funds; and when outstanding checks are considered, the bank balances were in a constant state of overdraft (see Exhibit H and R. 303-12), as the opinion of the Court of Appeals recognizes.

19. Defendant objects to the proposed finding that Coast Redwood had sufficient funds to make timely payment of the taxes when due (page 11, lines 31-2). Defendant requests that the court find,

instead, that, Coast Redwood did not have sufficient funds to pay its total business and trade obligations; that during the indictment period both its business obligations and its withholding tax obligations increased; and that in deciding what payments to make with the available funds from time to time defendant was motivated by the desire to keep the business going and was influenced by the degree of pressure exercised by each obligor and was not seeking to defraud the government.

20. Defendant objects to all of the proposed findings denominated "Wilson Controlled Coast's Profits," at page 12, lines 1-28, for the reasons and on the grounds already set forth above in Paragraph 17.

21. Defendant objects to the proposed findings denominated "Extra Judicial Admissions" at page 12, line 29, to page 13, line 6. The statement that defendant said he knew he had violated the letter of the law but not the spirit of the law is based on the special agent's inaccurate memory of a conversation (R. 456) rather than on the memorandum prepared at the time which, as developed later in the trial, showed that what defendant actually said was that he had not intended to violate the law and that he may have violated the letter of the law but not the spirit (R. 497-8; see Exhibit B for Identification, which is the special agent's memorandum). The other statements in this proposed finding do not show any wilful intent to evade tax.

22. Defendant objects to the proposed findings denominated "Claimed Fire Loss" at page 13, lines 8-21, and requests instead that the court find that Coast Redwood incurred substantial loss of business and of manpower by reason of the large fire in the woods in August, 1952, and that the level of sales during the three weeks of operation in July, 1952, was never reached during the balance of 1952, even though the period of greatest output normally is from August to October (see R. 332-6, 345, 373-5, 651-6).

23. Defendant requests a finding that Coast Redwood filed timely tax returns which correctly disclosed its withholding tax liabilities, and that neither Coast Redwood nor defendant concealed any of such liabilities or the fact of nonpayment thereof from the government.

24. Defendant requests a finding that the nonpayment of Coast Redwood's withholding tax liabilities was a matter of constant discussion between defendant and other Coast Redwood employees and representatives of the government; that the government representatives were armed with warrants of distraint and made a considered decision not to seize Coast Redwood's assets but to permit it to continue in business, notwithstanding their knowledge that the tax liabilities were increasing and that the bulk of the available funds were being used to pay business creditors; and that the government representatives were motivated by the hope that with additional time the business could be saved and the taxes

paid in full (R. 320-32, 603-15, 622-7, 831-50, 862-74).

25. Defendant requests a finding that Coast Redwood never paid any dividends and never paid a salary to either defendant or any member of his family.

26. Defendant requests a finding that he did not wilfully, or with evil motive, attempt to defeat or evade the payment of taxes owed by Coast Redwood, and that he is not guilty of the charges alleged in the indictment.

27. Defendant objects to the following portions of the Conclusions of Law, prepared by plaintiff: Paragraphs Nos. 7, 8, and 9, on page 14, lines 9 to p. 15, line 2. These are recitations of facts, and have been covered in objections previously listed.

28. Defendant objects to Paragraph 10 of the Proposed Conclusions of Law (page 15, lines 3-5), and requests instead that the court adjudge the defendant not guilty on each count.

Respectfully submitted this 30th day of June, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON, and
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Defendant.

Receipt of a copy of the foregoing acknowledged this 30th day of June, 1958.

LLOYD H. BURKE,

U. S. Attorney;

By /s/ R. H. FORTE,

Assistant U. S. Attorney.

EXHIBIT No. 1

Thursday, August 2, 1956

(Remarks of Judge Goodman following Mr. Avakian's statement prior to imposition of sentence.)

Case of U. S. vs. Wilson

The Court: I have gone through the whole file in this matter. I spent several hours yesterday on it.

Mr. Avakian: Then your Honor is fully familiar with the fact that these were not just casual discussions but were actually lengthy negotiations in which lawyers and accountants participated.

The Court: I read documents and I read the accountants' negotiations. I think that when men get into this business of perspective. How in the world any foundation of the kind that the defendant was negotiating with through this man Walker was going to buy a lumber business—a logging business of this kind for an investment for a foundation is something to me that is incomprehensible; but yet

they spent a great deal of time and prepared a lot of documents, options and agreements and whatnot and submitted them until finally in Florida the man gave them the final "No," because he said that there was still a matter that required a month or more investigation.

I only say that to you not because I question the veracity of this, because it is quite evident that these things were done; but how any one could have any hope of having a foundation of the nature of this Boston foundation buying this kind of an involved business or the property that it had—any one that was operating a foundation that was going to put money into a thing like this ought to have his head examined, that's all I can say. However, it is evident that they did spend the time involved and these documents fully demonstrate that, which, as I say, goes to show the sort of subjectivity that people that are promoting a thing like this have; they can't look at this thing any other way. However, I am just stating this to you to indicate that I think I have a clear awareness of the nature of these activities and that they did take place.

Mr. Avakian: And I am sure that your Honor also noticed that this very foundation during this period consummated the purchase of some farm lands in the San Joaquin Valley for several million dollars.

The Court: That I can understand, but not the purchase of the involved properties that the defendant through his various companies controlled. That to me is incomprehensible. However, if the

promoter is articulate enough, as they usually are, I guess they can make people believe almost anything.

Mr. Avakian: I think your Honor noticed that the stumbling block on this deal was not the price, which apparently was agreed upon, but simply the amount of guaranty; it had reached that point.

The Court: That is what the man from the foundation said. Maybe he had a certain gentility with respect to these matters and that was one way out of it.

(Further remarks by Mr. Avakian, then follow the remarks of Judge Goodman in passing judgment which have been previously transcribed.)

[Endorsed]: Filed June 30, 1958.

[Title of District Court and Cause.]

OPINION, FINDINGS AND DECISION

Heretofore, the Court adjudged the defendant guilty of six counts of wilfully attempting to defeat and evade the payment of employee income taxes withheld by him from employee's wages. § 2707(c), Internal Revenue Code of 1939. Sentence was imposed. Upon appeal, the Court of Appeals, reversed the judgment of conviction and remanded the cause to this Court "for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if

any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.”

The Government elected not to introduce any further evidence. Hence the defendant made no evidentiary response. The Court thereupon heard arguments of counsel with respect to the reconsideration of its former decision. I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel.

The Court of Appeals, upon the basis of colloquies between the Court and counsel during the trial, determined that the Court applied wrong legal standards at the time of decision. It would be unseemly to question the premise of this Appellate determination. However, there would seem to be uncertainty as to the nature of these colloquies.¹ It is sufficient to say that at the time of decision the Court adjudged the defendant guilty because it was

¹The opinion states: “The District Court took the position during the course of the trial that the knowing and intentional disbursement to others of funds withheld from the employees for payment of income and social security taxes constituted an offense under 2707(c).”

Excerpts from colloquies during the trial are cited in footnotes in support of this statement. But a careful reading of these excerpts, plus an awareness of the practical nature of trial proceedings, clearly indicates that the court took no position with reference to this question but was attempting only to elicit the views of counsel thereon. In fact this was the case.

convinced beyond a reasonable doubt that defendant had wilfully and for the evil motive of tax evasion affirmatively committed the acts charged in the indictment.²

No special findings, pursuant to Rule 23 F.R.C.P. were requested. This, of course, means findings requested on specified issues. The opinion of the Court of Appeals recognized that the right to

²•The Court: In this case of the United States against Wilson No. 34803, the indictment charges the defendant, in six counts, with wilfully attempting to evade and defeat payment of Federal income and social security taxes withheld from the wages of employees of Coast Redwood Company, Inc., a corporation controlled by defendant and members of his immediate family and of which he was president. The six counts concern the second, third and fourth quarters of 1952; three counts deal with withheld income taxes and three counts with withheld social security taxes.

“The charge is laid under Section 2707(c) Title 26 USC (1939 ed.), which makes it a felony to ‘wilfully attempt to evade or defeat payment of taxes.’ Section 2707(c) must be distinguished from Section 2707(b), which latter section makes it a misdemeanor to wilfully fail to pay any tax required to be paid. Section 2707(c) and 2707(b) are replicas of Sections 145(a) and 145(b) of the Internal Revenue Code.

“The Supreme Court in *Spies vs. United States*, 317 U.S. 492, held that to sustain a conviction under Section 145(b) [1005] of the Internal Revenue Code there must be evidence of ‘affirmative’ action in order to make out a cause of wilful ‘attempt’ to evade a tax or payment thereof—a purely negative act of nonpayment being insufficient.

“The issue here in this case is whether the government has presented evidence, sufficient to satisfy

special findings had not been preserved on appeal, but declared that the circumstances of the case required that appellant (defendant) be given "the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.

Findings

The Court finds that its "conception of the constituent elements of the offense" is the same now as

and meet the 'Spies' standard, which is convincing beyond a reasonable doubt of the defendant's guilt.

"I am satisfied that the evidence shows beyond question that the defendant here knowingly and deliberately set and followed a course of so operating the business of Coast Redwood Company, Inc., as to advantage himself and his companies by the use of the withheld employees' taxes; and that such course of conduct affirmatively constituted wilful evasion of payment of these taxes. This he did with full knowledge and awareness of the nature of his course of action and of its consequences.

"We have not here, as suggested by counsel, a simple case of a merchant engaged in a continually losing business eventuating in unpaid debts to creditors including the United States. In my opinion, this is a flagrant case of a pattern case of evasion knowingly, wilfully and consciously commenced and carried out. Consequently the defendant is guilty of wilfully attempting to evade the payment of the taxes in question under the standards fixed by the United States [1006] Supreme Court.

"The motion for judgment of acquittal is denied. The motion to strike Exhibit 43(a), which has not already been ruled on, is denied.

"The Court finds the defendant guilty on all six counts of the indictment." R.p. 962, 963.

it was at the time of judgment, namely that for a conviction the evidence must show beyond a reasonable doubt the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment in violation of Section 2707(c) of the Internal Revenue Code of 1939.

The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts.

Decision

Wherefore the Court adjudges the defendant guilty of the charges set out in counts 1 to 6, inclusive, of the indictment. August 1, 1958, at 10 a.m. for sentence.

Dated: July 28, 1958.

/s/ LOUIS E. GOODMAN,
Chief Judge.

[Endorsed]: Filed July 28, 1958.

United States District Court for the Northern
District of California, Southern Division
No. 34803

UNITED STATES OF AMERICA

vs.

ARTHUR KING WILSON.

JUDGMENT AND COMMITMENT

On this 8th day of August, 1958, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a finding of Guilty of the offense of Violation: of Title 26, United States Code, (1939 Ed.), Section 2707(c), as made applicable by Section 1430, as made applicable by Section 1627—Evading Payment of Taxes Withheld from Wages as charged in All Six (6) Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months and pay a fine to the United States of America in the sum of Five Thousand (\$5,000.00) Dollars on Count One of Indictment.

Further Ordered that defendant be imprisoned for a period of Eighteen (18) Months on each of Counts 2, 3, 4, 5 and 6 of the Indictment, said sentences to run Concurrently with each other and Concurrently with sentence imposed on Count One (1).

Total Imprisonment—Eighteen (18) Months.

Further Ordered that execution be stayed until August 11, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

[Endorsed]: Filed and entered August 8, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 8th day of August, 1958, and respectfully states as follows:

1. Appellant's name and address are as follows: Arthur King Wilson, 2025 Meadowview Lane, Reno, Nevada.

2. The names and addresses of appellant's attorneys are as follows: Spurgeon Avakian and J. Richard Johnston, 900 Financial Center Building, Oakland 12, California. Telephone: GLencourt 2-2133.

3. The offenses of which appellant was convicted are attempts to defeat and evade payment of withholding taxes of Coast Redwood Company, a corporation, for the second, third, and fourth quarters of 1952 in violation of Section 2707(c) of the Internal Revenue Code of 1939. The First, Second, and Third Counts involve the income tax withholdings from the wages of employees of said corporation for said quarters, respectively, and the Fourth, Fifth, and Sixth Counts involve the Social Security tax withholdings from the wages of said corporation for said quarters, respectively.

4. The judgment of the Court was that defendant be confined in an institution designated by the Attorney General for a period of eighteen months on each of said six counts, all sentences to run concurrently, and that the defendant be fined the sum of Five Thousand Dollars (\$5,000.00) on the First Count of the Indictment. Judgment was rendered on August 8, 1958.

5. The Court, on August 8, 1958, granted a stay of execution of said judgment until August 11, 1958, and also fixed bail pending appeal in the amount of Two Thousand Five Hundred Dollars (\$2,500.00), provided that a Notice of Appeal be filed.

6. Appellant appeals from said judgment to the United States Court of Appeals for the Ninth Circuit.

Dated this 8th day of August, 1958.

SPURGEON AVAKIAN and
J. RICHARD JOHNSTON,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 8, 1958.

The United States District Court, Northern
District of California, Southern Division
Criminal No. 34,803

UNITED STATES OF AMERICA,
Plaintiff,
vs.

ARTHUR KING WILSON,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Louis E. Goodman, Judge.

Appearances:

For the Government:

LLOYD H. BURKE, U. S. Attorney, by
ROBERT H. SCHNACKE,
Assistant U. S. Attorney.

For the Defendant:

AVAKIAN & JOHNSTON by
SPURGEON AVAKIAN, ESQ.

July 18, 1958

The Clerk: United States versus Wilson.

Mr. Schnacke: Preliminarily I should state that the mandate of the Court of Appeals has been handed down and that this Court is under instructions from the Court of Appeals to reconsider the evidence in this case for the purpose of making findings, meeting certain of the problems that were outlined by the Court of Appeals in their Opinion which was reported at 250 Fed. 2d 312. In that Opinion, at page 318, that Court points out that:

“The conduct rendered felonious by Section 2707(c)” — which, of course, is the section of the Internal Revenue Code under which the indictment in this case was brought — “contains two constituent elements. They are a particular subjective state of mind — ‘wilful’ — and certain objective activity carried on pursuant to such mental state — ‘attempt to evade or defeat the payment of the taxes.’ They must coexist to constitute an offense. In other words, the defendant must have wilfully engaged in the attempted evasion.”

Then, at page 320 of that Opinion, the Court points out that the phrase “in any manner,” which is used in Section 2707(c), “covers novel and unusual as well as common methods of evasion, for it is all-inclusive.”

There are certain citations and the Court goes on to say: [2*]

“Consequently, the diversion of available funds

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to affiliates and other creditors in preference to payment of government obligations qualifies as an affirmative act under the statute and would warrant conviction, if done with the requisite state of mind."

Now, a reading of the record again of this particular case makes it plain to me, as, unfortunately, it did not to the Court of Appeals, that this Court was fully aware of the elements of the offense as the Court of Appeals has outlined. Nonetheless, the Court of Appeals, at page 321 of the Opinion, points out in the second column:

"To warrant imposition of the heaviest of penalties assessable for nonpayment of taxes, the principal purpose of all such penalties being compliance, it must also be found that the defendant's conduct was prompted in part at least by tax evasion motives. This the Trial Court did not do."

As I say, with respect to that, I am at total disagreement with the Court of Appeals but obviously we are bound by that opinion and it is therefore necessary for that opinion to be taken into consideration in preparing the findings that have been ordered. As I say, a reading of the record makes it perfectly clear to me that your Honor was fully aware of the necessity that the tax evasion motive be made out, that wilfulness was an element of this offense, and I am entirely satisfied that your Honor's judgment of guilty in this case was based upon no misconception of the underlying law but on a full awareness of the facts, that there was required to be shown a combination, not only of the

acts of this defendant that very successfully avoided the making of payments over of the withholding taxes and other taxes that were withheld pursuant to his direction, but also of the fact that his state of mind in so doing was the state of mind described by the Court as a necessary element in this offense.

However, the Court of Appeals, at page 325, point out what they considered to be three possible circumstances that may have existed under the state of the evidence in this case. In the first column they say:

“It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business, or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by Section 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under Section 2707(a). All these possibilities exist.”

The statement that “All these possibilities exist” I take it to be a statement that under the evidence any one of those possibilities would be supported by the factual information contained in the record. Accordingly, that the evidence would, as it stands in the record, support a conviction of the felony

charge under Section 2707(c), and the Court has specifically said that they find that the evidence does support the judgment of conviction rendered by the Court but it is only because of an excess of caution, I suppose, on the part of the Court of Appeals that they found it necessary or desirable to reverse.

We have submitted to your Honor proposed findings of fact which state in detail the various elements of the offense and the evidence that was adduced at the trial to establish the elements of the offense in each of the charges of the indictment. I think this is not the time to argue the credibility of witnesses, to attempt to give weight as between the defense testimony and the government testimony, or to try to decide as between contradictory testimony. As I say, I am satisfied that your Honor was fully aware of the requirements of the law. I take it that your Honor's decision that this defendant was guilty was based upon an understanding both of the law and of the evidence in this case, and I think at this point the significant attention should be directed towards a brief summary of the facts of this case in order that we may see from those facts [5] whether or not they do, indeed, make out the evidence of the state of mind that the Court of Appeals says must be found in a case of this sort.

Basically, as I visualize the activities of this defendant, one of the most significant of all of the facts is the existence of these thin corporations with which he operated. The Coast Redwood Company was organized with the capitalization of \$5,000. The

A. K. Wilson Lumber Company was organized with the capitalization of, I think, \$1,250. Both of those corporations engaged in transactions running into the millions, and those corporations were organized with the intent that they should engage in just that type of transaction and on that scale, so it is quite clear, I think, that when those corporations were formed, they were formed with the idea that the operating funds were to come, not from the investment in the corporate stock, not from real capital, but that the operating funds were to come from periodic advances from one of the multifarious corporations controlled by the defendant in this case. And when we examine the operations of the companies, we find that that is exactly what happened. Moneys were advanced, were transferred, were circled around in circuitous manners under such circumstances as to permit every company that the record gives information about to be judgment-proof at practically all times. The operating assets, for example, of Coast Redwood Company weren't owned by Coast Redwood Company, they were owned [6] by affiliate companies. When Coast Redwood went into the Chapter 11 reorganization. As a matter of fact, this defendant even tried—at that time through some inadvertence apparently some of the operating equipment had been permitted to appear to be standing in the name of the Coast Redwood Company, and he tried furiously to get even that out of the Chapter 11 proceedings, because obviously he never intended that that sort of thing should happen, that any company that was liable

for its bills should ever have any assets on hand to pay the bills, and the record makes it amply clear whenever Mr. Wilson is describing transfers of funds from one corporation to another, he points out that the money was transferred because there were checks outstanding that had to be covered. The only time he and the affiliate companies got around to putting any money into the ventures was when checks were outstanding that were going to withdraw it from the ventures immediately. So it seems to me that these organizations were conceived, organized and operated in a fashion that was designed to and that did permit a defrauding of all creditors, and that includes, of course, the United States of America. The activities were made in a fashion that prevented any creditor, including the United States, from ever stepping in and protecting its rights, and the activities of the defendant were such that a tremendous onus would have been placed upon any creditor, and particularly on the United States, if these organizations were shut down and [7] with the result that a variety of men were put out of work by action of the United States, and it was on that that this defendant capitalized.

Coast Redwood Company, organized in 1945, had by the beginning of 1950 or '51 some half million dollars in earnings over the period of its activities up to that time. At the beginning of the indictment period, after a loss of over \$200,000, they still had remaining over \$300,000 in earned surplus that resulted from the earnings of the corporation in prior

years. And yet during the period of time that this corporation, with a \$5,000 capitalization, had earned over a half a million dollars its obligation to the United States on taxes withheld from employees was in default during substantially all of the time.

There has been dispute, and your Honor pointed out that he thought the dispute was unnecessary, as to whether transfers of funds that were made as between the various affiliated companies resulted in a net increase of funds in Coast Redwood or a net outgo of funds from Coast Redwood. Your Honor said that he felt that that was not a significant detail, and I am inclined to agree. As I say, the nature of the capitalization of this company was such that it was absolutely imperative and contemplated from the beginning that funds would come in. The only way it could operate would be for there to be the periodic advance of funds from the affiliates. But there was no [8] necessary contemplation that funds go out. The incoming funds were absolutely essential for its organization from the very way it was built up at the beginning, but the outgoing funds were something that were entirely under the control of this defendant and something that he directed out for his own benefit and to the detriment of the United States and of other creditors of the organization. So, as I say, whether moneys came in, in net amount as one reading of the books would indicate, or whether there was a small net going out of the company, as another reading of the books would indicate, seems to me to be totally meaningless. The money going out did

not have to go out unless it was going out to the United States in payment of—at least in part—of the tax obligation that this defendant had. The record makes it amply clear, too, that at all stages of the period of time covered by the indictment there were ample funds on hand to pay the obligations, and the statements made by the defendant over and over again that he didn't have money on hand is a meaningless thing. What he meant is he didn't have enough money on hand to do everything with the money that he chose to do, but there was at all times and during every month of this period sufficient moneys on hand for him to have paid this obligation to the United States and he deliberately handled his funds in a fashion that prevented that from being done.

The whole attitude of this man toward the United States [9] Government and the Internal Revenue Service has been one of stall from the first time that the record talks about any of his activities in connection with the Internal Revenue Service. The record is just replete with promises and broken promises, with commitments and failures to perform the commitments, with directions to his employees to ignore the promises that had been made, and most significant of all, I think, is the indication of this man's state of mind when your Honor questioned him. That is page 696 and following of the record. Your Honor was questioning the defendant concerning his promise and commitment made in August of 1952, and he made it clear to your Honor at that time that when he made that promise he had

no intention of living up to the obligation. He was promising in August of 1952, something he says he didn't think that he was going to be able to perform; he would do it if he could. And there is one point in the record where he points out—I think that is at page 669 of the record—there was one time during the summer, I think of 1951, in which business was pretty good, apparently he had money he didn't know what to do with, and he said at that time, "I was happy to pay some part of it to the United States." But those are apparently the only circumstances under which he would find it necessary or desirable to make any payment to the United States.

So, as I say, we have a record of promise after promise being broken, of funds being handled in a fashion that permitted [10] this man to control all of the financial positions of these companies; the price at which he bought merchandise was controlled by him; the price at which he sold merchandise was controlled by him. We discover, for example, by adjusting an entry made long after the fact he can adjust the profit as between companies. If one company has too much profit, why, he simply makes an adjusting entry a couple of years later in the records of the organization and then clears that profit off in a fashion and reduces it in one case and increases it in another corporation where it does him some more good. He was using these corporations as pawns in a chess game that was permitting him to—I was going to say "make monkeys" but

that isn't a very appropriate phrase—but permitted him to deal in a very loose fashion with all of his creditors, including the United States of America, and, as I say, an examination of his testimony and an examination of the broken promises in this case, an examination of the directions that he gave to his employees, show that this was all done consciously, schemingly, designedly for the purpose, at least in part, of defrauding the United States.

Now, I am not at all certain that the United States was the sole object of his scheming. I think it is quite clear that other creditors also were placed in a difficult position by reason of the activities of this defendant. But the only one we are concerned with, and one of the principal creditors of the organization, was the United States, and his [11] activities very clearly were designed to prejudice the ability of the United States to collect the moneys that were owing to it on behalf of the employees of this organization.

The findings as submitted have outlined the instructions given by this defendant to his office manager. I don't think it is necessary to reiterate those. It is sufficient to point out that the control of the funds of the organization were entirely in this defendant's hands, by the testimony and in large part by his own admission that he was the one who decided what payments were to be made and which of the creditors were to be favored by a payment at any given time, and he was the one that decided that the United States of America should have an extremely low priority. He was the man that made

promises to the Internal Revenue Service that moneys would be deposited, and he was the man that countermanded his orders to his subordinates to make any such deposits. He was the man that periodically promised the United States that payments would be made on account and thereafter directed his subordinates not to make such payments.

The findings we have submitted also point out that during the period of April 1, 1952, to January 31, 1953, the disbursements of this organization amounted to over \$2,600,000. We have included within that finding the various disbursements that were made by this organization to its affiliate organizations and disbursements that were made to the defendant himself. The [12] suggestion is made, particularly with respect to that \$19,000 disbursement to Wilson, that for some reason, the Court of Appeals makes this suggestion, that didn't really go to him because he did something else with it, he passed that on to some other organization. But the fact remains that \$19,000 came out of the Coast Redwood Company, it went to Mr. Wilson, subject to his control, and he did with it what he wanted to do, and the mere fact that that money went into another organization doesn't make it any less a withdrawal from Coast Redwood by Mr. Wilson himself.

Another extremely significant thing is the sale of the assets of Coast Redwood Company, or part of the assets, in the year 1951 on which Coast Redwood Company received almost a million dollars. Your Honor may recall the quibbling in the record and

the great tears of grief that were indicated because it was only almost a million dollars. I think some 75,000 wasn't paid in cash, and the record has several pages of Mr. Wilson's feelings that he had been badly treated because \$75,000 out of a million had been held out from him. But we have heard no such solicitude for the United States on the amount of money that has been held out from the sums due it. But in any event, in 1951 almost a million dollars in cash was received by Mr. Wilson, by the Coast Redwood Company, in payment for certain of the assets of that organization, and no part of that money was devoted to the liquidation at that time of any of [13] the obligations of Coast Redwood Company to the United States. Instead, all of that money, which was in effect, if not a windfall, at least additional non-operating moneys coming into the control of Coast Redwood Company, and no part of that money, as I say, was used for the liquidation of the obligations of the United States, either of the past obligations or of the current obligations that were ignored from day to day.

As I say, this record is replete with evidence of the method by which Mr. Wilson was using this corporation and other corporations for the purpose of designedly keeping any creditors, including the United States, away from any of the assets of his operating companies. His activities were overt. He very definitely performed affirmative acts that made it impossible for the United States to enforce its rights against his companies. He made misstatements to United States Agents, he made deceiving

statements to them, he made promises that he had no intention of keeping. After making promises he deliberately gave instructions that prevented his subordinates from carrying out the obligations that he had assumed for the corporation. And I think all of these activities can quite clearly be traced to the desire to evade the payment of the taxes that he was obligated to pay over to the United States.

I think this record is strong in support of your Honor's finding that this defendant was guilty of the charges contained in the indictment, and the Court of Appeals apparently agrees [14] that that finding is supported by the evidence. I think an adoption of findings of fact substantially in the form proposed by the United States will support that judgment of your Honor in a fashion that will be acceptable to the Court of Appeals and I strongly urge that the findings submitted be approved.

Mr. Avakian: May it please the Court, I appreciate the fact that Mr. Schnacke did not personally participate in the trial of this matter in which the Government was represented by Mr. Lockley, who is no longer with the Government, and it is therefore simply by way of observation and certainly not by way of any criticism that I would like to point out that the remarks which Mr. Schnacke has made as to the theory on which this case was tried two years ago is not the theory which was being presented to and emphasized to the Court at that time. For example, Mr. Schnacke stated that one of the most significant facts of tax evasion here is the

thinned corporation situation. At the trial, however—not only throughout the trial but in the argument where he was tying everything together—Mr. Lockley emphasized as the most significant fact of all the fact that Mr. Wilson was directing the employees what bills to pay and was, therefore, personally responsible for the fact that some of the available funds were being used to pay business creditors rather than for paying in full the withholding tax obligations.

I think, not only from my participation in the trial but from a reading and re-reading of the record several times [15] since, that it is clear that this novel case, which concedingly was a test type of case, was presented to the Court and was tried on the theory that with respect to withholding taxes as distinguished from a taxpayer's own income tax obligations, that with respect to withholding taxes the knowing use of existing funds for the payment of other obligations, with the knowledge that they were unpaid delinquencies, was itself a wilful attempt to evade tax. This was premised on the fact there is a trust fund type of obligation imposed on the employer with respect to withholding taxes and in this respect the taxpayer is in a different position from his own income tax obligations and, therefore, the idea was that the Court should hold that with respect to funds on which a trust is impressed the mere act of using those funds for some other purpose with knowledge of the unpaid obligation is an act of evasion of payment of a withholding tax.

The Court of Appeals held that even though there is a trust impressed upon the employer with respect to withholding taxes that the obligation imposed upon him by statute is exactly the same as the obligation imposed on him with respect to his income taxes. I am speaking now of his obligation to pay over, and there is a sentence in Section 3661 of the 1939 Code, which is quoted in one of the footnotes of the Appellate Court's Opinion, which says that the obligation to pay over the payment of the withholding tax—that is in Footnote 12 of the Opinion— [16] Section 3661 of the 1939 Code, which, in referring to the withholding tax obligations as a trust, says: "The amount of such fund shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose." And then the Court says, in its comment on this, in the footnote: "Thus, the second sentence, in terms, refutes the notion that 'special fund' taxes are a novel breed of tax to which the traditional criteria of civil and criminal responsibility are inapplicable."

And this matter is then back before this Court for the purpose of having the Court re-examine the evidence to determine whether there is something more here than the knowing use of existing funds for purposes other than withholding tax payment. Is there substantial evidence here which would satisfy the Court beyond a reasonable doubt that what was done was done with the evil intent of try-

ing to evade the taxes, as distinguished from the non-evil intent of trying to keep the business going, trying to hold off all of the creditors as much as possible in the hope that ultimately the financial condition would be such as to permit payment of everybody? And it is with respect to that that we believe that the evidence does not show, and certainly does not show beyond a reasonable doubt, that the defendant was motivated by this evil desire.

I would like to point out to the Court in view of the [17] fact that this was a novel and unique case, as everybody concedes, that Congress has now provided a criminal procedure and penalty which does relate specifically to this type of situation. Early this year, in February, there was enacted an amendment to the Internal Revenue Code which deals specifically with this problem of accumulating withholding tax obligations by businessmen who are in financial difficulties. That is set forth in Sections 7512 and 7215 of the Internal Revenue Code of 1954, which was sent to the President and signed by him in February of 1958. That new procedure provides, in substance, as follows, and because the two sections are two pages long, I will take the liberty of paraphrasing them: Whenever any person who is required to collect and pay over withholding taxes fails to make the deposits, payments or returns of such tax, and he is notified by notice delivered in hand (that is, personal delivery of notice) of such failure, then there comes into play the requirements of the criminal penalty, and the criminal

penalty is that—well, let me state it another way. There comes into play the requirement, after he has received such personal notice, that thereafter, by the second banking day after each payroll payment, he shall deposit the amount of the withholding taxes in a separate bank account, and if he fails to do that, he is guilty of a misdemeanor, and it shall not be any defense to that that immediately after that, the payroll payment, he didn't have sufficient funds on hand to make [18] this deposit in the special bank account.

The committee report, both the Senate and the House reports, show that this statute was enacted for the specific purpose of dealing with the situation of an extremely large number of delinquent withholding tax accounts resulting from business failures or, at least, temporary business difficulties, and the Senate report says that the felony criminal provisions for tax evasion are not appropriate for this type of situation because—and I am quoting here: “The Courts in the criminal cases generally have refused to treat as wilful those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government.”

This statute then, first of all, eliminates the wilfulness requirement. Secondly, it provides for this special notice and the obligation following that. And then it provides that a failure to comply is a misdemeanor rather than a felony.

The Court: Do these two new sections specifically repeal Section 2707(c)?

Mr. Avakian: No. I didn't mean to imply that they superseded the prior section.

The Court: This is an additional statute?

Mr. Avakian: Well, I am sure that as to the future the intent of Congress was that this would be the penalty made [19] available for the business difficulty type of situation.

Section 2707(c) of the 1939 Code was, of course, previously repealed and incorporated generally into the tax evasions section of the new Code, and I am sure that the felony tax evasion section remains applicable in situations applying to withholding taxes where there is the requisite deceptive type of conduct.

The Court: In other words, there still could be a prosecution under 2707(c)?

Mr. Avakian: Yes, there could be.

The Court: If the requisite elements were shown?

Mr. Avakian: That's right.

The Court: But there also could be a prosecution in other cases where the elements required to be shown as provided in Section 2707(c) are not present.

Mr. Avakian: That's right. My point in mentioning this is, when Congress specifically dealt with this problem, which has been a problem—there is no doubt—with this problem of widespread cumulative deficiencies in withholding tax payments resulting from business difficulties, Congress felt that the tax evasion felony provisions were not the suitable

remedy for that type of situation, but instead, provided this other.

The Court: They were obviously designed to facilitate the collection of these taxes by the Government, as a [20] practical matter, to provide the means and method of handling that situation by these provisions with the deposit of money in special bank accounts.

Mr. Avakian: Yes. And I think clearly this was designed to enforce by the threat of a misdemeanor criminal prosecution the priority which the Government has as a matter of civil law with respect to these funds by providing——

The Court: By the time this case started there wasn't anything novel about Section 2707(c); it had been on the books since 1939, I think, and, if I recall correctly, the novelty, I think, which I may suggest, arose by reason of the fact that there hadn't been any prosecution under 2707(c)——

Mr. Avakian: That's right.

The Court: ——rather than that there was any novelty inherent in the provisions of the sections.

Mr. Avakian: That's right. And when I referred to the novelty of the case, I meant that this was really a case of, shall we say, a test type of case or the first type of case of its type, as applied to this situation.

Now, unquestionably there were far more funds passing through Coast Redwood hands than the amount of the withholding tax liabilities. There was approximately two and a half million dollars that went through Coast Redwood hands in the period

covered by this indictment, and the withholding tax liabilities were somewhere around a hundred and forty or a [21] hundred and fifty thousand dollars, of which payments were being made, either for current or delinquent accounts, approximately two-thirds of that amount, so we don't mean and never meant to contend that the funds that came in were less than the obligations. But it is also clear that the total obligations, business obligations of Coast Redwood, were greater than its available funds, because after all of the available funds were disbursed, not only did the withholding tax obligations to the Government increase, but the obligations to the other creditors also increased by some \$90,000-odd, as the uncontradicted record shows. So that what we really have is a situation in which there were not enough funds to pay everybody and the defendant followed the course of paying where the pressure was the greatest and, in what I think would be typical fashion in the business world, he tried to hold off everybody as long as he could in the hope that nobody would shut him down and that he could extricate himself in these business difficulties either by improved business conditions or by a sale which would give him the money to pay it, and it is that type of situation and that type of conduct which is involved here.

This conduct is not carried on under a blanket or with any concealment from the Internal Revenue representatives, but, on the contrary, by the testimony of the Internal Revenue representatives themselves, this conduct of paying where the pressure

was the greatest and trying to keep going was stated [22] to them and known to them and recognized by them, and even they themselves, armed with the warrants for distraint which would have enabled them to shut down, stated that in their judgment they thought the best interests of the Government would be to permit a continuance of operation and they testified specifically that they knew of course that a continuance of the operation meant that there would be payments made to the other creditors, so that this payment to other creditors, as well as the partial payments to the Government, was something known to everybody on both sides. It was not carried on in any atmosphere of concealment or deception.

The point which is being urged now, that there was a failure to live up to promises, is again undoubtedly because of Mr. Schnacke's lack of familiarity with the trial itself, directly contrary to the position taken by the prosecutor who tried the case, who said specifically that he was not contending that the failure to live up to the promises in that agreement of August, 1952, was tax evasion conduct. He was referring to the agreement, he said, simply to show Mr. Wilson's knowledge of the obligations. And the Court itself joined in that expression by saying that there couldn't be a conviction based on a failure to live up to the promises. The references to that are set forth in my objections to the proposed findings and so I will not repeat them here specifically. But the record is completely clear, both with respect to Mr. Lockley's [23] disclaimer of this

argument and the Court's comments that the defendant couldn't be found guilty for breaking a promise or failure to live up to it. And with regard to Mr. Schnacke's statement that Mr. Wilson in his testimony at page 696 testified that he didn't intend to keep his promise when he made it, the record clearly shows that his testimony was not that, but, rather, that he stated to the Internal Revenue people that he didn't think it was possible for him to maintain this schedule of payments which they were setting up for him, but that, he told them, he would try to do it.

The statement that he told the people at the time, that he didn't think he could keep the schedule, that he would try to do it, is quite different from the contention that he was making a promise with the secret intention of not keeping it. There was nothing secret about his belief that he could not maintain it. And, in any event, there were specific extensions given from time to time, as Mr. Valdi's own testimony shows, and he was the man that gave the extensions for the Internal Revenue; as the time for these increased payments came along, Mr. Valdi, almost on a week-by-week basis, gave the extensions.

In the proposed findings Mr. Schnacke had asked the Court to find—and he hasn't repeated it here—I assume because we have called his attention, by our objections, to certain other matters, but in the written proposed findings there is the contention that Mr. Wilson's statements to [24] Mr. Valdi during

this period, the latter part of 1952, that he was negotiating for a sale and hoped to have a sale consummated for \$7 million was a false representation. We have answered that in two ways; first of all, we pointed out that it would be up to the Government to show the falsity of that representation, and there was not one iota of evidence to show the falsity. But your Honor will recall that Mr. Valdi testified as the last rebuttal witness in the case and it was at that time that he mentioned these conversations in which Mr. Wilson had told him that he was negotiating for a sale. Your Honor, I am sure, will also appreciate that Mr. Wilson's office is in Portland, and with these various companies the records are voluminous. Both because there was no contention made testimonially that these representations were false and because of the late stage at which this came and the remoteness of the records, we didn't attempt to go further into that, but, as your Honor recognized at the time of imposition of sentence and we have attached to our objections two pages of transcript of those remarks, there were submitted to your Honor lengthy, thick files which showed the negotiations which Mr. Wilson had mentioned to Mr. Valdi, and your Honor commented that it seemed kind of foolish that this Boston Foundation would be thinking of buying this kind of a business, and I am inclined to agree, and your Honor said, I think, "They ought to have their heads examined." But your Honor recognized, there was no question [25] but that the negotiations had been going on. And I have got the file here again.

It's almost an inch thick—not only with the Boston Foundation, but with the M. & M. Woodworking Company in Portland, and both of these sets of negotiations had, as your Honor will recall, reached the stage of lawyers (Dunne, Dunne & Phelps here in San Francisco) drawing up lengthy contracts and revisions of contracts; there was even an option executed at one point for the \$7 million price.

While those things are not in the trial record of this case, your Honor did examine all of this, and I think it would be most unfortunate, as well as unjust, if a finding were now made that there was a deceptive misrepresentation made with regard to these negotiations when, in fact, as your Honor had recognized at the time of sentencing, there was no doubt that the negotiations had been going on, and you will recall that even in January of '53, shortly before the Chapter 11 proceedings were commenced, the broker from Portland and Mr. Wilson made a trip to Florida for the specific purpose of trying to complete the sale with the head of the Boston Foundation.

Now, Mr. Schnacke had not mentioned that in his oral argument, and I assume it is because he learned for the first time, through reading your Honor's remarks attached to our objections, that that was actually the fact, and I am sure that Mr. Schnacke wouldn't want to have asked the Court to make this kind of a finding in view of that. But that clearly shows [26] there is no basis for the contention that Mr. Wilson was deceiving Mr. Valdi when he told

him that he was conducting these negotiations and that there were serious negotiations going on.

Mr. Schnacke has referred to the thin corporation of Coast Redwood in 1945 with a capital of \$5,000 as a significant fact tax evasion motivation. I am a little bit surprised at this. First of all, that occurred in 1945, and by 1952, the period we are concerned with, the equity investment of the owners of this corporation as represented by the earned surplus retained in the business was \$360,000. Now, therefore, at the time that we are concerned with, the owners of this business had over \$300,000 of equity invested in it. They didn't draw out these profits; they let them accumulate as earned surplus, making them available, therefore, as funds for the business and as funds to which the creditors could look, if necessary, for payment.

Your Honor will recall from the record that there was not a single dividend paid by Coast Redwood at any time and that Mr. Wilson and members of his family, these stockholders, never took a dollar in salary at any time during its corporate life.

Certainly these facts would indicate, not that they were trying to remove money from the reach of the creditors, but, rather, that, if the corporation was thinned, as it clearly was, it was not for a tax evasion motivation but, rather, for the [27] normal reason that tax lawyers set up thin corporations, so that when there is time to take some of the profits out of the business, when profits accumulate beyond the needs of the business, that they can be taken out in the form of repayment of loans rather

than in dividends which would be subject to double taxation.

I have participated in debates in the American Bar Association on suggested legislation which would, as a matter of law, make beyond the reach of attack by Internal Revenue in civil cases a ratio of ten-to-one, of thin corporations, of ten dollars of debt to one dollar of equity investment, and the tax section of the American Bar Association finally adopted a recommendation of a six-to-one ratio, and this would, as a matter of law, if adopted, make it impossible for the Internal Revenue to question, even in a civil case, the propriety of the thin corporation.

I mention this simply to show this matter of thin corporation is a familiar method used, a completely respectable basis of setting up corporations without any thought or suggestion that it is a criminal tax evasion device. But even if it were, the fact that there is \$300,000 earned surplus left in the business by this period would, I think, clearly negate any thought that Mr. Wilson was trying to remove the assets of this business from the reach of the creditors.

Mr. Schnacke even went so far as to say that the records [28] satisfied him that not only was Mr. Wilson trying to defraud the Government, but he was trying to defraud his other creditors. Now, to me, your Honor, that is an incredible statement, in view of the evidence in this record which came from the attorney for the trustee in bankruptcy, Mr. Tosi, that during the bankruptcy court proceedings Mr.

Wilson gave his personal notes to all of the unsecured creditors of Coast Redwood Company in the total amount of \$185,000. Now, certainly that is not consistent with any contention that he was trying to defraud the creditors or that he was a defrauding type of person.

I think we can, certainly with validity, criticize Mr. Wilson for his business practice of putting available cash assets into physical assets, and quite often into timber which was difficult to convert, which was not very liquifiable. As a matter of business judgment, I think he clearly over-extended himself by not leaving enough fluidity in his assets and by keeping his cash position short, and that type of business practice can be successful in the business world if you are riding a favorable market, but when things become a little bit difficult, you get caught up short, and that is what happened to Mr. Wilson. But whether we agree or disagree with his business judgment on that, there is certainly nothing in that type of conduct, which was done openly, which would justify the conclusion that he was a criminal.

Undoubtedly, if he kept more cash available and invested [29] less in physical assets, he would have been able to weather this storm, and unquestionably over the years he followed the practice of trying to delay paying as much as possible because of this shortage of cash, and that again is a matter of business practice and business judgment, with which I would not agree personally—I don't think any of us here would, but that is a far cry from a deceptive or

fraudulent type of conduct which would become a felony under this statute.

Mr. Schnacke has referred to this Hull sale in 1951. First of all, that abortive sale or unfortunate sale was past history by the end of 1951. Well, before the period we are concerned with here. Nothing became available by reason of that sale during the period to which this indictment relates. Secondly, the \$925,000 which Mr. Hull paid prior to taking possession was not Coast Redwood's money or payment to Coast Redwood, but, rather, this was a total payment for a contract for the purchase of the assets of three corporations, the A. K. Wilson Lumber Company, Union Bond and Trust Company, and the Coast Redwood Company, so that it related to those three corporate properties and not just the one. But, finally, the uncontradicted evidence is that all of that money, which was paid prior to the delivery of or possession of Mr. Hull, was used to discharge obligations necessary to put these three companies in a position to make delivery. That's where the money went. And there is nothing in the record to justify, [30] even by inference, the belief that any portion of that money was on hand in 1952 as available for the payment of the withholding taxes to which this indictment relates.

Mr. Schnacke has referred to the matter of the transfers of funds between the affiliates. I think that in anything which is as complex accounting-wise as this is, we could probably argue forever on just exactly what dollars and cents amounts represent the transfers in and out. But I think there is no

question in dealing with the basic question, there is no doubt in this record that the transfers of funds and interspersed with the transfers back from the affiliates to Coast Redwood, there is no doubt that the transfers to the affiliates did not exceed the transfers from the affiliates to Coast Redwood. On our analysis of the matter—which I believe is a correct one or I wouldn't have presented it to the Court—we believe that there was a net inflow of better than \$250,000 from the affiliates. On the Government's analysis, which takes into account some price adjustments made two years ago, the thing would approximately balance out. Even then, in lieu of those subsequent price adjustments on the sales to A. K. Wilson Lumber Company, if we put the market price on the stumpage which Coast Redwood bought from its affiliate, the \$15.00-per-thousand price of market value, instead of the \$5.00 paid, we would then again have a net inflow into Coast Redwood. But I think for present purposes we can rest on the fact that there clearly was not a [31] net inflow of funds. The Court of Appeals' Opinion recites there that “* * * it does not appear that Coast Redwood Company flagrantly favored, or was favored by, its affiliates” in these transactions.

Mr. Schnacke takes the position this morning that the inflow of funds from the affiliates is not important but the outgo is, and I think that in making that statement he is again subconsciously perhaps falling back on the contention that Mr. Lockley was making at the trial of this matter, that if you know there are withholding tax obligations and, instead,

you use the money for some other purpose, such as a repayment to an affiliate, that in itself is an act of tax evasion.

I think that the inflow is important because it relates to the question of intent, and the fact that this continuous inter-flow did not favor the affiliates, that there was no net outgo to the affiliates, shows that there was no evil intent in any of these particular payments but, rather, that this inter-flow was simply a matter of trying to get temporary capital for a few days to pay outstanding checks to keep the business going.

If the intent in the outflow in the particular out-payments were tax evasion, if the intent were to put the assets beyond the reach of the tax collector, then it just wouldn't make sense to take back the same amount of money the next week or the next month. So that the fact that as much came back as [32] went out shows that the intent was not to put assets beyond the reach of the tax collector.

Now, since we have in our written objections to the proposed findings set forth at least in brief from the basis for our objection to all of the specific findings that we object to and have indicated in connection with those the findings that we would like to have the Court make, I don't want to take the Court's time to go through those individually. Our objections are 13 pages long, and the proposed findings are 15 pages long. Unless the Court would like to hear argument on some of those particular matters that haven't been mentioned in the oral argu-

ment, I would rest on the statements that are made there and the references made in connection with them.

I would like to close with the observation that, looked at from the viewpoint of whether there was a fraud in the usual sense of that word practiced on the Government, that there is no substantial evidence here which would warrant the finding that it was tax evasion conduct beyond a reasonable doubt. I think we do have the situation here of a businessman who, for whatever the reason may have been, and undoubtedly it could be said that poor business judgment was a part of the reason, but whatever the reason may have been, we have a man whose business had outstanding a total of obligations greater than the money coming in to pay them—that is uncontradicted; there is no doubt about that—and in trying to keep this business going, [33] he parceled out the money with partial payments to the Government and partial payments to his other creditors and in a way which resulted in his going deeper into debt with his other creditors and also going deeper into debt with the Government. But all of this was done openly with the knowledge of the Internal Revenue people, who were conversant with the situation on a week-to-week basis and whose own judgment coincided with the defendant's, that the best way for the Government to get its money out of this situation was to let the defendant continue to operate in this fashion in the hope and expectation that things would work out.

As the Court of Appeals mentioned in its Opinion,

had that expectation (held on both sides) been fulfilled, the case probably wouldn't even be before them. I don't think it would have been brought in this court.

The conduct of Mr. Wilson immediately after this Opinion likewise shows that he was not proceeding on the basis of fraud because, not only did he give his personal notes to unsecured creditors, as I mentioned a moment ago, but during the Chapter 11 proceedings, as debtor in possession, he operated this business on a revised basis, restricted to logging, and eliminating the mill operation, he continued to have his other corporations make available at \$5.00 a thousand timber which had a market value of \$15.00 and, as a result of operations from about April, 1953, to June, 1954, he built up assets in the bankruptcy court [34] available for the payment of these taxes approximately \$170,000 over and above the payment of all the secured creditors that had priority to the Government, he built up this fund, as the record shows, which was then available for the payment of these taxes, subject only to the expenses of the bankruptcy court proceeding and the administration expenses and to a disputed claim of about \$13,000. So that, even after he went into the bankruptcy court, when if he had been of a mind to defraud, he could have turned his back on the whole thing, he, instead, made this stumpage available at a very favorable rate to permit the accumulation of money with which these taxes could be paid.

I believe that, looked at from the viewpoint of

whether there is deceptive conduct of the tax evasion type, that the Court should properly find that the defendant here was not guilty.

The Court: Counsel, there are some areas or problems involved in this matter which neither of you has touched upon, which give me some concern, and I would like to call your attention to them. Perhaps we could discuss the matter a little further.

The novelty in this case, in my opinion, is not the novelty of it having been the first case brought under this Section, but the novelty of it now is the posture in which the Court finds itself on the remanding of his case, of a criminal case, to make additional findings in a criminal case where the [35] case was tried by the Court and not by the jury, and where special findings were not requested.

Now, I have some questions to ask of counsel in aid of the Court's understanding of this case and to aid the Court to solve the problem. Before I do so, however, I want the record to be absolutely clear, so that there will be no future need for psychoanalyzing the mind of the Court, that these are inquiries propounded and a discussion for the purpose of aiding the Court and not an expression of the Court's decision in advance of the decision in the case.

There are some problems here that arise by virtue of the nature of the decision. Number one, what sort of findings did the Appellate Court intend this Court to make? It is not too clear to me, but after a careful reading of the Opinion, I don't think that it was the intent of the Court of Appeals that this

Court should make findings of fact on all of the facts of the case, as if it were, upon conclusion of the trial, making the same kind of findings that it would make in some sort of civil case as to whether or not payment was made or transfer made on such and such a date, that it was for this purpose or that purpose or the other purpose. I think, rather, that the clear purpose of the Court of Appeals in remanding this case was to make findings only on the question of the state of mind of the defendant in connection with the transactions involved, and I think that that is the extent to which [36] this Court should go, after hearing whatever you gentlemen have to say by reargument of the facts, as you have already done to some extent, or on the basis of any other reargument that you wish to make as to what finding the Court should make in this case.

On page 325 of the Opinion I find that that apparently is what the Court of Appeals had in mind. Judge Barnes says:

“Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule 23 * * *”

Since no special findings were requested here, as pointed out by the Appellate Court, and because of their opinion that “The circumstances of the case,” they say, “are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court’s conception of the constituent elements of the offense,”

I think that whatever finding this Court should make now should be the simple findings one way or the other as to whether or not the elements of the offense which the appellate Court states to be necessary are present in this case or not. That doesn't in any way prevent any argument on the facts, as the record discloses what the findings should or should not be on the question of intent, but I think that that is the extent of any finding that the Court should make now. [37]

I would try my best to apply what I think is the opinion of the Court of Appeals here. I would find it impossible to make findings of fact two years after the event because, if the decision, the verdict of guilty, was based upon the Court's view as to the testimony of the witnesses and the records in the case at the time the evidence was furnished, I cannot, it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event. That is impossible and I wouldn't undertake to do it, and, unless there is some new, revolutionary doctrine promulgated in this case, I couldn't do it.

So I feel that the only function of the Court to perform here is to make a finding of fact on the basis of the rule of law set forth in the Court of Appeals' Opinion as to state of mind, as to the constituent elements that make up this particular state of mind of the defendant in connection with the acts that were done, and that, I think, is all that I can do.

So that the record may be clear again, there is

nothing new, in my opinion, in the statement of law as made in the Court of Appeals. I am not only bound by it, but I am in thorough agreement with it. I have never had any contrary views to that stated by the Court of Appeals with respect to the necessity of tax evasion motive and wilfulness being present. Despite what is said in the Opinion, I never indicated anything to the contrary. [38]

But, however, as I see it, the question is: What kind of a finding should the Court make, either one way or the other? What is the area of that finding? That, I think, is the important question, particularly in view of the statement of the Court of Appeals, on page 325 of the Opinion; and since there was no request for special findings here, then I think the Appellate Court intends me only to make a finding on the question of state of mind.

Perhaps, since we have kept the reporter going here continuously, we might take a brief recess and then give you gentlemen a chance to state your views further.

(Short recess taken.)

Mr. Schnacke: If your Honor please, first of all, I take it that your Honor's remarks with respect to your familiarity with the record did not relate in any way to your overall recollection of the trial, the witnesses that appeared, the general nature of the testimony that was given in this case. I am sure this case is not that old, that your Honor's recollection—other than the minor details

and, very probably, the analyses of the various documents in evidence—that sort of thing, of course, has faded somewhat into the past, but I feel, certainly from your Honor's remarks today, that you are still fully cognizant of the major elements of the case itself and of the general nature of the testimony given by all of the witnesses, particularly by the defendant himself. [39]

I was inclined and am still inclined to your Honor's point of view with respect to the nature of the finding that is required by the Court of Appeals. Possibly I should have submitted the proposed findings in a different form. I submitted them in the present form in order that all of the matters upon which your Honor might be inclined to make a finding would be before your Honor, and not with the intention that these findings either should or would be adopted in the form in which they were submitted.

I think, too, it is clear from a reading of the Opinion of the Court, the Court feels that if there had been a finding or an indication of a finding and words clear enough to be read while running, the Court of Appeals would not have reversed. It was only because they did not see such a finding as your Honor suggested, that is, to the effect that the intent of the defendant was so and so when these various acts were performed, could not be read into the record by them, that they did reverse. So, I would think that a finding at the present time equivalent to what they say was not found originally should be sufficient.

I might suggest, however, that it would be advisable to relate that finding, whatever it might be—I might urge that it might be the finding that the requisite intent did exist—to certain of the significant pieces of evidence in the case upon which the finding is based. I think it is probably not necessary that the findings be in any way as detailed as those [40] that were submitted by us.

This, as your Honor says, is a totally novel type of remand in a criminal case and I frankly have no more idea than your Honor does of what it was that is contemplated by the Court of Appeals, but I do feel that the findings should be related to those specific portions of the evidence that do appear to bear upon or I suggest that it might be desirable to do that or, on the other hand, it might be desirable only to base it upon the total evidence.

The Court: I find in my own mind some difficulty in determining the intent of the Court of Appeals with respect to the finding. I could not and would not undertake to redetermine the guilt or innocence of the defendant on the record. I do not think that is what the Court of Appeals intended, and it would be an impossible task. No one could do that, no judge could do that.

I want to hear further from counsel in the matter.

I think what the Court of Appeals means is that the Court should make a specific finding as to the state of mind of the defendant so that then it can be determined whether that finding of fact as to the state of mind is warranted by the law, by the statute, and the elements that are necessary as de-

terminated by the Court of Appeals for the requisite state of mind to warrant or not warrant a finding of guilty. I can't see that there is anything else that was intended, but I feel that this [41] is the time and is the purpose of the hearing, to give both sides an opportunity to present their views as to not only what they think the finding of the Court should be, but the form of the finding.

Rule 23 provides for special findings but in itself it requires that the particular findings that are requested have to be set out. It says, “* * * shall in addition on request find the facts specially.” First of all, there has to be a request for some special findings, and that means that someone has to specify the findings, the issue upon which the findings are requested, because the Court couldn't pick that out of thin air. And we don't have that; that wasn't in the record. The Court of Appeals recognized that, and so they said:

“* * * we believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.”

And so my opinion is at this time, and again I say it is not the decision of the Court but just an attempt to open our minds to suggestions and argument, that that is the only finding that the Court can make in the case, that is, a finding with respect to the motives and state of mind of the defendant.

Mr. Schnacke: Of course we urged to the Court of Appeals that it was inappropriate to turn it

back here for [42] findings at this time in view of the fact that no requests for findings had ever been made by the defense. I take it that it is inappropriate now for us to demand that the defense make a Rule 23 motion with respect to findings, because the Court of Appeals has done that for them, not, however, with the particularity that would be desirable or would be required if the motion were made by the defense.

The novelty of this leaves me, as I am sure it does your Honor, with some degree of uncertainty as to what the Court of Appeals wants. I am satisfied that their requirements should be fulfilled simply by a finding of the state of mind of the defendant at the time the various acts done were done, and I say that should fulfill the requirement. Whether in the opinion of the Court of Appeals it will fulfill the requirement is the question that causes me to suggest that possibly something short of a full finding might be made, a finding with relation to a portion of the facts. I suggest that in the same spirit that I lodged the proposed findings, and that is from an over-abundance of caution, feeling that the more that was found, the more likely it would be the Court of Appeals would be satisfied. But I personally feel that the simple finding as suggested by your Honor would fully satisfy the requirements of the Court of Appeals and is the finding that should be made, and I merely suggest to your Honor's judgment the possibility of adding some other matters to it; I don't urge [43] that upon your Honor at all.

Mr. Avakian: I think, your Honor, I am suffering under the same problem of not having found any authority which would indicate what specifically the Court of Appeals had in mind here, but it seems to me that the Court must have had in mind something more than a mere finding in the language of the statute because to me that would not be a special finding. That's a general finding of ultimate facts.

The Court: Let me interrupt you. I didn't mean a finding in the language of the statute. I meant a finding of the state of mind of the defendant. That is what they specifically asked for, I think. I don't think that would be a conclusion; that would be the verdict. In other words, if the Court only made a finding in the language of the statute, that would be a verdict or a decision one way or the other. But what I meant is that the Court should in response to this mandate of the Appellate Court, make a finding as to the state of mind. However, what have you to say about it?

Mr. Avakian: I am further handicapped, of course, because my belief is that there should be a finding, a judgment of not guilty in this case, and the findings to be made to support that conclusion do not present the same problem that would arise if the Court made the opposite conclusion, for obvious reasons. One of them being that there would be no appeal, and therefore, no review. [44]

The Court: In other words, if the Court came to the conclusion that the finding should be in this case that the defendant didn't have the requisite

state of mind, all that would be necessary would be a finding of not guilty.

Mr. Avakian: Well, as a practical matter, yes, because the question of just exactly what issues the Court of Appeals had in mind for findings would be rendered immaterial and unimportant.

In terms of what would conform with the Court of Appeals views as to findings in the event the Court should conclude that the judgment should be guilty, it seems to me that a finding that the defendant had the intent of intending to evade payment of the tax would in substance simply be a paraphrase of the statute, it would not set forth anything specific, and, accordingly, I would think that the Court of Appeals had in mind that if the Court should make findings to support a conclusion of guilty, that it should set forth in specific findings the conduct which constitutes the tax evasion conduct and that would be one of the constituent elements. In other words, the element of affirmative conduct would be found in special findings relating to the particular actions which constitute the affirmative conduct. And then the other constituent element of wilfulness would require a finding that these particular acts were done with the evil intent of attempting to evade tax. [45]

Unless it were done that way, it seems to me that it would not fit within the category of special findings as distinguished from a general finding of guilt.

I share your Honor's feeling that it really is impossible two years later to reappraise the details

of the evidence, and, as your Honor may know, we contended before the Court of Appeals that this type of remand that was made presented an impossible situation which was unfair both to the defendant and to the Court because we think it is unfair to the Judge also to ask the Judge to try to reappraise the evidence two years later. Certainly a judge would, through his training, be at less of a disadvantage than jurors would be if they were called back to reappraise it, but nevertheless, basically the same problem is there.

The Court: Was there any attempt to get any clarification of this from the Appellate Court at all?

Mr. Avakian: After the remand was made and the order modifying the original opinion, we filed a petition for rehearing, raising the question which I have just mentioned, and that petition was denied without further opinion or explanation.

The Court: As it is in the book, the terms of this remand were changed?

Mr. Avakian: The original opinion remanded the case for a new trial. [46]

The Court: Oh, yes. Yes, I recall now. Then there was a change.

Mr. Avakian: Then the Government filed a petition for rehearing, and the order which denied the Government's petition for rehearing modified the Opinion by substituting the last paragraph of the original Opinion and stating instead:

"The judgment of conversation is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth

in this Opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.”

So that that paragraph is substituted for the last paragraph in the original Opinion which remanded the case for a retrial.

The Court: So now we are here in accordance with that remand, either side having the right to introduce any further evidence, “* * * for reconsideration in accordance with the principles set forth in this Opinion, and for further findings by the trial court * * *”

Mr. Avakian: Yes. Incidentally, the opportunity for further evidence is presented to the Government with the opportunity to the defendant to answer any new evidence which the Government might produce.

The Court: And the Government chose not to produce any.

Mr. Avakian: That’s right. Now, it seems to me, as I said a moment ago, that the Court of Appeals must have had in mind that the “further findings” that are mentioned here would set forth the particular acts or actions which are considered to be the tax evasion conduct to satisfy the special findings requirement as to one constituent element, and then a special finding as to whether those acts were done with or without the requisite evil intent. Unless it means that, it seems to me, that the special findings discussion would not be satisfied, and it seems to me that——

The Court: Of course, all they say, Mr. Avakian, in the Opinion, and all they talk about in the Opinion is the view of the Appellate Court as to the state of mind of the Court concerning the applicable law. They say the facts in the case would be sufficient if the proper principle of law were applied to warrant a conviction.

Mr. Avakian: The facts would be sufficient, they say, to support any one of three conclusions, a conclusion of felony, a conclusion of misdemeanor, or a conclusion of innocence.

The Court: That's right.

Mr. Avakian: That's right.

The Court: Which puts the Court in a very [48] embarrassing position because I think the Appellate Court is clearly wrong in its psychoanalysis of my state of mind. But I don't know what to do about it. It would be much better if they just left it, if they weren't satisfied with the decision, to send it back for a retrial or just reverse it, because, I say here very frankly to you, as I mentioned a moment ago, that not only am I bound by the opinion of the Court of Appeals as to the law applicable, but it is my own view of the state of the law, and it is the view of the law that I had at the time. It is very difficult for me, very embarrassing, to take that position, and it may be that I may have to write some sort of memorandum in the case; otherwise, I find myself in a very uncertain state of mind as to what the Appellate Court wanted done, and when it involves the liberty of a person under a criminal statute,

that's not a very satisfactory mental state for a judge to be in. I would do the best I can with it under the circumstances. I think that this perhaps should have been clarified more so that what the judge should do is more clearly stated. It is the duty of the trial court to follow what the Appellate Court says. That's what I would want to do. But I can't find the defendant guilty or not guilty because the Appellate Court tells me I should find him guilty or not guilty. They can reverse the judgment but there is no power on earth, nor in the law for one judge to tell another judge how he should find on something. After he makes a decision, he can say it [49] is a wrong decision and reverse it, or he can require that a certain action be taken, such as some ministerial or other act or direction that some act be done. But I don't think there is any under our system of law that an appellate or any other judge can tell another judge how he should find, because that is his function in the first instance, but he can say that is a wrong finding or reverse it.

Of course, it is part of our procedure for thwarting error, by the appellate process. I don't know what it is precisely, what sort of a finding, the appellate court is asking me to make.

Mr. Schnacke: Possibly this might clarify it, if your Honor please. As Mr. Avakian pointed out, the original decision of the Court of Appeals was that the case should be reversed and remanded for a new trial. Following that, the United States petitioned for a rehearing and suggested a rehearing en banc. That petition for rehearing was based, first, upon

the proposition that the judgment of conviction was based upon the proper subjective standard of wilfulness and that the Appellate Court had misconstrued and misinterpreted the standard employed by your Honor in deciding the case.

And then, as an alternative, we suggested that: "If the opinion of the Appellate Court is not reversed, the proper remedy is not remand for a new trial but for special findings pursuant to Rule 23, Federal Rules of Criminal Procedure." [50]

There are only two paragraphs and possibly it might be of assistance if I read those to your Honor:

"Assuming, *arguendo*, that this Honorable Court denies the rehearing hereinbefore petitioned and adheres to its present opinion, appellee requests in the alternative that the case be remanded to the District Court for special findings pursuant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial. As the Court's opinion points out, appellant made no formal request for findings pursuant to Rule 23 (citing case). Accordingly, the appellant did not properly preserve the question of law for purposes of appeal. We recognize that findings may, of course, be made even in the absence of any request (citing a case).

"The trial of this case consumed nine days and resulted in 973 pages of the printed record and voluminous accounting exhibits. To require retrial solely for the purpose of affording the trial court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court's opinion would entail unnecessary expendi-

ture of time and money. There being no other error, it is manifest that the trial court having the record before it could readily make such special findings under Rule 23 as may [51] be necessary to clarify the factual basis upon which he determined the existence of appellant's specific wilful intent to evade payment of the withheld taxes." Now, that language appears to be, to a certain extent, adopted in the Opinion when they say: "The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this Opinion."

In reading that sentence, which is on page 326, again I am not overly clear on what they are saying. They say: "The case is remanded to the District Court for reconsideration" and then, after a comma, they go on to say, "and for further findings by the trial court, after the Government has introduced evidence, if any * * *"

Now, it may very well be that the findings that are there referred to are intended only in the event that there should be new evidence, but I am inclined to think, in the light of the request that was made by the United States, that it be remanded for special findings, that it was the contemplation of the Court that the special findings should be made whether or not new evidence was introduced. But the Court of Appeals, I think, has suggested a reconsideration——

The Court: I think that this Court is duty-bound to reconsider the decision in the light of what the Court of Appeals has said.

Mr. Schnacke: And I suppose that would be

true [52] even though there was, as your Honor has pointed out, nothing novel.

The Court: I think that this Court is duty-bound to reconsider—under this mandate it is duty-bound to reconsider in the light of everything that the Appellate Court said—it may be that it is not necessary to make any finding one way or the other—that the Court reconsider the case in the light of what is expressed by the Appellate Court and make a new determination of it, giving its reasons for it. It may be that it is not necessary to have findings.

Now, that is not my opinion, again so we don't get into any trouble upstairs, but I am just wondering if on a reconsideration of the case the Court could, in the light of what is said by the Appellate Court, redecide the case, maybe without having any findings as such, but giving the reasons for its decision one way or the other.

What do you think of that, Mr. Avakian?

Mr. Avakian: Well, considering the language of the revised paragraph in the light of the language from the Government petition for rehearing which Mr. Schnacke just read, it would appear to me that the Court did have in mind special findings based on a reappraisal of the evidence.

The Court: Yes, I realize that, but unfortunately we all don't have the same experience in the trial of cases. I say "we all"—all judges don't. What is meant by special [53] findings is some finding that is specially required and requested. It isn't that the judge just generally makes all kinds of findings in

a criminal case, just like it does in a civil case, and then only, really in 95% of the cases, on the proposals of the party who has prevailed in the case, with amendments suggested by the other side. I don't think the Appellate Court—I am not sure, but I don't think they meant that—maybe they did, I don't know—that upon this hearing each side should be given an opportunity to specially request certain findings.

Mr. Schnacke: Well, generally speaking, special findings, I think, would refer to specific questions that are asked of the trier of the fact: Is the fact so and so? Now, it seems to me that a reading of the Opinion of the Court of Appeals makes clear what the question is that is being asked of your Honor. The question is—these actions which the Court of Appeals concedes are sufficient if done with the proper intent to support the finding of guilty; these acts were performed by the defendant—were they performed with a state of mind, with the intent to defeat and evade the payment of the taxes? It seems to me that that is the only question that could conceivably be asked by this Opinion.

Obviously, the defendant does not ask for special findings. The Court of Appeals has, and a reading of the entire decision shows that that is the specific question they [54] are asking: Were the acts done with the requisite intent? And I would assume that your Honor can make a finding one way or the other with respect to that question without going anywhere beyond. At one point of the Opinion, for example, they say: "Was the diversion of funds—"

Well, it is true it is only one of the acts, but, at least, it is an act which they recognized as sufficient to be the act of evasion——

The Court: However, though, Mr. Schnacke, they do say, and I am reading from 325:

“The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained.”

And one of them was that the defendant so acted in part to evade or defeat the payment of taxes.

It may well be that all they want is the finding that the defendant acted, with respect to the matters charged in the indictment, to evade or defeat the payment of the taxes. They want the Court to say that.

Mr. Schnacke: In view of the fact that the only uncertainty appears to have been the state of your Honor's mind rather than the state of the defendant's mind in this case, it would seem to me that a clarification of your Honor's—that there is one of two things that could be done: One would be for your Honor to say: This is what I intended all the time, I am fully aware of the law; the other would be to say: I was [55] unaware of the law; I now see the law in a different light, and seeing it in that light, I reconsider.

I would think that the state of your Honor's mind would determine whether there should be an overall reconsideration of all of the problems in the case which would result if your Honor had misconceived the law in the first place, or if there had been no misconception, then it would seem foolish for there

to be a reconsideration of matters that your Honor has already considered.

The Court: I said to Mr. Avakian in that connection, looking back at the case two years ago, that I can only say now that I would not have found the defendant guilty of the charges contained in this indictment unless I were convinced beyond a reasonable doubt that what he did was a wilful attempt to evade the payment of these taxes. I mean, looking back, I don't think I would have found him guilty unless I was certain in my own mind that that was so. I think I so stated at the time of imposition of judgment, although the Appellate Court seems to have somewhat of a different viewpoint about it.

But now I think the problem is maybe, Mr. Avakian, somewhat the way Mr. Schnacke presents it, that I reconsider the case either saying that I always did have this point of view and I disagree with my appellate brethren in their analysis of my view of it, or that applying the law now as laid down by the Appellate Court, my decision is such and such. Maybe those [56] are the only two things that I can do.

It is a very troublesome, and I can say with far more positiveness than the Appellate Court said because I have been sitting in the trial court for 16 years, this is the most unique matter that has ever been presented to me and its uniqueness is occasioned by the manner in which the mandate of the Appellate Court is couched in a criminal case. I have never heard of anything like this before. I don't know of any other trial judge that has had

this experience. But there it is, and it is certainly very unique, and it is very disturbing, and it is very difficult when a man's liberty is at stake to have to engage in these kinds of niceties and technicalities in endeavoring to follow the reasoning of some other judge in the matter, who didn't hear the evidence and didn't see the case and didn't see the witnesses and so forth.

However, I will be glad to hear anything further that you want to present, Mr. Avakian, or Mr. Schnacke wants to present, either orally or in writing or in any way you want to present it.

Do you have any further ideas in the matter?

Mr. Avakian: I was just going to suggest, in somewhat light vein, perhaps we would be better off if the Government had not filed its petition for rehearing and left the original Opinion.

The Court: That might have been. It's hard to say. [57] As far as I am concerned, it would be much easier for me.

Mr. Schnacke: To look at it seriously, it has been the Government's point of view that there was never any doubt in your Honor's mind as to the law to be applied to this case. Now, in the light of that, it would have been nonsensical for this case to have been returned to be retried, and with only that one question to be determined.

The Court: Well, it would have been because of the fact that it was a court tried case. If it had been a jury case, it would have been very simple. If the judge gave the wrong instruction of the law to the jury, then it could have been returned for

retrial. But here the Appellate Court engaged in the unique enterprise of trying to analyze the lower court's state of mind after a finding of guilt. That is something particularly unique and presents a difficult problem.

You were going to say something else?

Mr. Avakian: I hope that your Honor and I know each other well enough so that I can say without embarrassment to either of us that I, of course, was of the view that the Court had been applying a rule of law different from that which the Court of Appeals announced and I am satisfied that the Government prosecutor was trying it on a different theory than the Court of Appeals announced. but that is behind us and we are in a situation now where we as attorneys have to accept as a premise the conclusions of the Court of Appeals which your Honor [58] has stated are contrary to your Honor's own views of what your state of mind was, and that makes it all the more difficult because we are in effect starting from a premise which your Honor finds it difficult to accept. But starting from that premise, if we start from that premise, that the incorrect principles of law were applied, then it seems to me that inevitably the Court of Appeals must have had in mind two things, one was a complete reappraisal of the evidence, with a fresh start of what the law is, and this is particularly so in a case where intent has to be inferred from circumstances, as it does here because of the significance of the circumstances which would give rise to one inference rather than another and depends on the ap-

proach of the trier of the fact as to what is important in the law in this conduct. So, I think that the Court of Appeals, having held that your Honor applied the wrong standard of law, must have had in mind that you would now make a fresh and new appraisal of the evidence, drawing such inferences as this new appraisal of the evidence would warrant in your mind in the light of the Court of Appeals' statement of the law.

As I said earlier, I find it difficult to contemplate that any human being, and I don't think I need to say specifically that I have a very high regard for your Honor's own ability in this regard, but still we are all human, and I don't think that any human being two years later can make this type of [59] fresh appraisal of evidence.

The second thing the Court of Appeals must have had in mind, then, by reason of the fact of this discussion of Rule 23 and of the Government's suggestion in its petition for rehearing that, if nothing else, the case be remanded for special findings under Rule 23, is that the Court would now make findings in the nature of special findings, whatever that might mean, which I would interpret to mean a setting forth of the specific acts and conduct which the Court considers the critical acts bearing on the question of tax evasion, coupled with a finding as to whether those acts were done with or without the requisite criminal intent.

Unless we have something of that kind, it seems to me that we would not be giving credence to the Government's request in its petition for rehearing

that the most that should be done would be a remand for special findings.

The Court: I will study it over some more, gentlemen. If you want to submit anything further, if you have any further ideas, in writing, why, I will be glad to hear whatever you have. If you think of anything in the next week or ten days, why, don't hesitate to send it in.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pretem, certify that the foregoing transcript of 60 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ [Indistinguishable]

[Endorsed]: Filed August 18, 1958. [60]

[Title of District Court and Cause.]

CRIMINAL DOCKET

1956

July 13—Trial Resumed, Evidence Introduced,
Ord. Contd. to July 16th for further
Trial.

July 16—Trial Resumed, Evidence Introduced,
Ord. Contd. to July 17th for further
Trial.

July 17—Trial Resumed, Evidence Introduced,
Ord. Contd. to July 18th for further
Trial.

1956

- July 18—Trial Resumed, Evidence Introduced, Ord. Contd. to July 20th for Decision.
- July 20—Trial Resumed, Evidence Introduced, Deft. Adjudged Guilty, as to all Cts. referred to Probation Officer, Ord. Contd. to Aug. 2nd for Hearing of Motions & Judgt.
- July 23—Filed Receipt of Exhibits, U. S. Atty.
- July 30—Filed Motion for a New Trial.
- July 30—Filed Notice of Motion for a New Trial.
- July 30—Filed Memorandum of Points & Authorities for New Trial.
- July 30—Filed Affidavit of Spurgeon Avakian.
- Aug. 2—Deft. Sentenced to Eighteen Months & Fine of \$5,000.00 on Ct. 1—Eighteen Months on each of Cts. 2, 3, 4, 5, & 6 to run concurrently—Stay of Execution until Aug. 3, '56. Ord. Bail on Appeal \$2,500.00.
- Aug. 2—Filed Notice of Appeal.
- Aug. 3—Filed Bail Bond on Appeal.
- Aug. 3—Filed Order Permitting Deft. to Leave Jurisdiction.
- Aug. 7—Filed Costs of Prosecution (\$1,124.16).
- Aug. 8—Entered Judgment & Commitment, filed 8/7/56.
- Aug. 10—Filed Designation of Matter to Be Included in Record on Appeal.
- Sept. 7—Filed Order Extending Time on Appeal—Oct. 15th.

1956

Sept. 11—Filed Order for Motion to Withdraw Exhibits.

Sept. 11—Filed Receipt of Exhibits.

Sept. 21—Filed Receipt of Record on Appeal from Circuit Court.

1957

Nov. 4—Filed Order Permitting Defendant to Leave Jurisdiction.

1958

Jan. 22—Filed Order Permitting Defendant to Depart Jurisdiction.

Mar. 7—Filed Mandate, Ord. and Adjudged by the Court of Appeals, that the Judgment of said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the Trial Court, after the government has introduced evidence, if any, and the Defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.

(November 14, 1957)

(As Amended by Order Filed February 27, 1958)

June 11—Lodged Plaintiff's Proposed Special Findings of Fact and Conclusions of Law, Pursuant to the Order of the Ninth Circuit Court of Appeals.

1958

- June 13—Filed Stipulation of U. S. Atty. to File Objections for Special Findings of Fact and Conclusions of Law.
- June 23—Filed Stipulation for Deft. to File Objections to Special Findings and Conclusions of Law.
- June 30—Filed Deft's. Objections to Plaintiff's Proposed Special Findings, etc.
- July 18—Ord. Findings Submitted.
- July 28—Ord. Deft. Adjudged Guilty as charged in Indictment, Aug. 1st for Judgt.
- July 28—Filed Opinion, Findings and Decision.
- July 29—Ord. Contd. to Aug. 8th for Judgt.
- Aug. 8—Ord. Deft. Sentenced to Eighteen (18) Months on Ct. 1 and Fined \$5,000.00 on Ct. 1—and Sentenced to Eighteen months on each of cts. 2, 3, 4, 5, 6 to run concurrently with Ct. 1. Stay of Execution until Aug. 11th.
- Aug. 8—Filed Notice of Appeal.
- Aug. 8—Filed Order Permitting Deft. to Depart from Jurisdiction.
- Aug. 8—Entered Judgment and Commitment, filed 8/8/58.
- Aug. 8—Order for Transfer of Funds on Bail Bond on Appeal.
- Aug. 8—Filed Bail Bond on Appeal.
- Aug. 15—Filed Designation of Matter to Be Included in Record of Appeal.
- Aug. 18—Filed Reporter's Transcript, dtd. July 18, 1958.
- Aug. 21—Filed Unexc. Commitment. 1st Trial.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Plaintiff's proposed special findings of fact and conclusions of law pursuant to order of the United States Court of Appeals for the Ninth Circuit, dated February 27, 1958.

Defendant's objections to Plaintiff's proposed special findings of fact and conclusions of law, etc.

Opinion, findings of fact and decision.

Judgment and Commitment.

Notice of Appeal.

Designation of matter to be included in record on appeal.

Photographic copy of the docket entries subsequent to the former appeal.

Transcript of proceeding of July 18, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court this 15th day of September, 1958.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ J. P. WALSH,
Deputy Clerk.

[Endorsed]: No. 16184. United States Court of Appeals for the Ninth Circuit. Arthur King Wilson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: September 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16184

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Appellant states that the points on which he intends to rely on appeal are as follows:

(1) The evidence is insufficient to support the finding of guilt as to any of the six counts in the indictment.

(2) The evidence is insufficient to show any affirmative conduct by appellant directed toward, or constituting, a wilful attempt to evade payment of any of the taxes in question.

(3) The Court committed error in denying appellant's motion for acquittal at the close of appellee's case, and also at the close of all the evidence.

(4) The Court committed error in sustaining the objection to appellant's offer to prove that, prior to the indictment, he had given appellee security for payment of the taxes in question, and that he had thereafter actually paid said taxes.

(5) The Court committed error in finding appellant guilty, in view of the Court's frank acknowledgment that it would be impossible to make a new

determination of the guilt or innocence of the defendant on the basis of evidence heard and received two years earlier.

(6) The Court committed error in failing to accept the decision of the Court of Appeals that the trial court had previously held an erroneous view of the law, and in again finding appellant guilty on the basis of the same view of the law as the trial court had at the time of the first judgment.

(7) The Court committed error in undertaking to determine the guilt or innocence of appellant on the basis of the former record two years after hearing the testimony and after having originally found appellant guilty on an erroneous theory of law.

Dated this 19th day of September, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 19, 1958.

[Title of Court of Appeals and Cause.]

No. 16184

STIPULATION REGARDING
USE OF EXHIBITS

Appellant having previously designated for printing Government's Exhibits 1, 2, 3, 4, 5, 6, 33, 35, 44.

45, 49, 50, 51, and 52; and Defendant's Exhibits F, G, H, I, J, K, and L, and said exhibits having been printed in connection with the former appeal in this matter; and

It appearing that the remainder of the exhibits introduced in evidence at the trial are of such a nature that the printing thereof would involve great expense and considerable time,

It Is Hereby Stipulated, by and between appellant and appellee, that each and all of the exhibits not designated to be printed may be used and considered as part of the record herein on appeal in their original form.

Dated this 15th day of August, 1958.

ROBERT H. SCHNACKE,
United States Attorney;

/s/ ROBERT H. SCHNACKE,
For Appellee.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

[Endorsed]: Filed September 19, 1958.

[Title of District Court and Cause.]

STIPULATION AND ORDER

In order to avoid unnecessary printing expense, it is hereby stipulated, subject to the order of the

Court, that the record printed in connection with the prior appeal (bearing Docket No. 15,301) in the above-entitled matter may be considered a part of the record on appeal herein without being reprinted; that all petitions for rehearing and answers thereto filed in the Court of Appeals after the original decision on such prior appeal may likewise be considered a part of the record on appeal herein without being printed; and that the parties may refer to, and the Court may take notice of, all matters to which this stipulation relates as if the same had been printed as a part of the record on this appeal.

Dated this 24th day of September, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

ROBERT H. SCHNACKE,
United States Attorney;

By /s/ ROBERT H. SCHNACKE,
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Circuit Judge;

/s/ WALTER L. POPE,
Circuit Judge;

/s/ STANLEY N. BARNES,
Circuit Judge.

[Endorsed]: Filed October 2, 1958.

No. 16,184

IN THE

United States Court of Appeals
For the Ninth Circuit

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

SPURGEON AVAKIAN,

J. RICHARD JOHNSTON,

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Pacific Building, Portland 4, Oregon,

Of Counsel.

FILED

DEC 23 1958

PAUL P. O'BRIEN, CLERK



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No. 16,184

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

Following a remand by the Court of Appeals because of the District Court's application of an erroneous rule of law, the District Court held that it had in the first instance applied the correct law announced by the Court of Appeals and accordingly again found the defendant guilty (R. 78-82¹) and imposed the same sentence of eighteen months' imprisonment plus a \$5,000.00 fine (R. 82-4), without taking any further

¹The reference "R." is to the record on this appeal. The reference "O.R." is to the record on the first appeal, bearing Docket No. 15,301.

evidence² and without undertaking to redetermine appellant's guilt or innocence on the basis of the evidence offered at the trial. (R. 124, 121.)

In the original proceedings in the United States District Court for the Northern District of California, appellant was convicted, after a trial by the Court without a jury, of willfully attempting to defeat and evade the payment of Federal Income and Social Security taxes withheld from the wages of the employees of Coast Redwood Company, Inc., a corporation (of which appellant was the president), in violation of Section 2707(c) of the Internal Revenue Code of 1939, as made applicable by Sections 1430 and 1627 of said Code. (26 U.S.C., Sections 2707(c), 1430, 1627.) The indictment (O.R. 3-12) was in six counts. The first three related to the income tax withholdings for the second, third and fourth quarters of 1952; and the other three, to the Social Security tax withholdings for the same quarters. Appellant was found guilty on all six counts. Each count alleged that the willful attempt was made within the Northern District of California by the following means:

- (1) By failing and refusing to pay said withheld taxes;

- (2) By causing said corporation to fail and refuse to pay said taxes;

²The mandate on the former appeal authorized the Government to present further evidence, and gave appellant the right to respond to any new evidence produced by the Government (R. 36), but the Government elected not to introduce any further evidence (R. 79).

(3) By withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of appellant and of corporations owned and controlled by appellant and members of his family; and

(4) By causing said corporation to use its funds to pay creditors other than the United States.

The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

The judgment of the Court rendered on August 8, 1958, after the remand was the same as before, namely, that appellant pay a fine of \$5,000.00 on Count One of the indictment, and that he be imprisoned for a period of eighteen months on Count One and an additional period of eighteen months on each of Counts Two, Three, Four, Five, and Six to run concurrently with each other and with the sentence imposed on Count One. (R. 82-4, O.R. 65-7.) Notice of Appeal to this Court was filed on August 8, 1958. (R. 84-6.) The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure. This Court has jurisdiction to review the final judgment of the District Court. 28 U.S.C., Sections 1291, 1294.

STATEMENT OF THE CASE.

On the first appeal, this Court concluded that the trial judge had erroneously applied a rule of law

which did not require, for evasion of withholding taxes, the evil motivation which must be shown for evasion of income taxes.³

After appellee had urged, in its petition for rehearing, that at most "the case be remanded to the District Court for special findings pursuant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial,"⁴ the opinion was modified, and in accordance therewith the judgment as finally rendered was that the cause be

"remanded to the said District Court for reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he so desires." (R. 37-8.)

The Government then filed in the District Court its proposed special findings, setting out at length the particular acts which it desired the Court to find were done with tax evasion motivation. (R. 40-59.) Appellant filed his objections to these proposed special findings and requested findings that his conduct was not motivated by tax evasion and that he was not guilty. (R. 59-78.)

³The Opinion of this Court is reproduced at R. 3-36. The original opinion is reported at 250 F.2d 312; and the denial of appellant's petition for rehearing, at 254 F.2d 391.

⁴The petition for rehearing has not been printed, but, pursuant to stipulation of the parties and Order of the Court (R. 150-1), is a part of the record on this appeal. The particular language quoted in the text appears at R. 133.

The matter was thereafter set for argument, which was heard on July 18, 1958. (R. 86-142.) At this argument, the District Judge raised the question as to what type of findings the Court of Appeals expected him to make (R. 119), and expressed the view that he should make only "the simple findings one way or the other as to whether or not the elements of the offense which the appellate court states to be necessary are present in this case or not." (R. 121; see also R. 120, 122, 125, 127, 135, 138.)

The District Court did not attempt to re-evaluate the evidence in the light of this Court's opinion. On the contrary, the trial judge said (R. 124):

"I could not and would not undertake to redetermine the guilt or innocence of the defendant on the record. I do not think that is what the Court of Appeals intended, and it would be an impossible task. No one could do that, no judge could do that."

Nor did the District Court make any special findings of fact. Instead, the trial judge said (R. 121):

"I would try my best to apply what I think is the opinion of the Court of Appeals here. I would find it impossible to make findings of fact two years after the event because, if the decision, the verdict of guilty, was based upon the Court's view as to the testimony of the witnesses and the records in the case at the time the evidence was furnished, I cannot, it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event. That is impossible and I wouldn't undertake to

do it, and, unless there is some new, revolutionary doctrine promulgated in this case, I couldn't do it."

The District Court made a finding that its "conception of the constituent elements of the offense" was the same as it had been at the time of the first judgment, namely, that there must be a showing that "the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment", and a finding that "the defendant wilfully and with the evil motive of tax evasion did commit said acts." (R. 82-3.)

Since appellant renews on this appeal his contention that there is no substantial evidence to support the conviction, a summary of the evidence is in order. Rather than repeat the lengthy statement of facts in our opening Brief for Appellant (pp. 3-19) in the prior appeal (Docket No. 15,301), we shall set forth herein verbatim the factual statement in the opinion of this Court on the former appeal (R. 5-15):

"This is a unique criminal case. There does not appear to be a single reported decision involving a felony prosecution for failure to pay withholding taxes. The instant case is not distinguished for that reason alone. It is unusual as well in that the acts alleged to constitute the necessary overt and objective element of the violation of Section 2707(c) do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases.

The evidence, largely uncontroverted, discloses that appellant organized and incorporated Coast

Redwood Co., Inc., in the State of California in May of 1945. It engaged in the logging and saw-mill business with operations centered in the redwood and fir forests of Northern California. The stock in the corporation was wholly owned by appellant and members of his family and he served actively as President from the date of incorporation. Coast Redwood Co. was one of several interrelated corporations owned entirely or substantially by appellant and members of his family and actively operated by appellant as President. Most of its business transactions and dealings were with these affiliated corporations. It functioned as a middle link in a vast chain of lumber enterprises whose activities extended from the acquisition of timber tracts to the sale of finished lumber. Two of these affiliated corporations, Union Bond and Trust Company and Ah Pah Redwood Company,⁴ owned or were purchasing the timber tracts upon which Coast Redwood Co. conducted its logging and cutting operations. Still another family corporation, A. K. Wilson Lumber Company, purchased rough lumber from Coast Redwood and remanufactured it into finished lumber for sale in the trade. In 1952 Coast Redwood sold all of its redwood log cants to A. K. Wilson Lumber Co.

Coast Redwood had originally been capitalized for \$5,000.00. It enjoyed success and prospered in the years preceding the indictment period and for that reason and perhaps also due in part to monies derived from an abortive sale of certain

⁴The Ah Pah Redwood Company was a wholly owned subsidiary of International Pulp & Paper Company. Appellant and his family owned all of the common stock and 20% of the preferred stock in the latter corporation.

assets of the corporation,⁵ Coast Redwood Company's capital at the end of the fiscal year on April 30, 1952, included earned surplus of \$306,433.04. This despite the fact that the corporation had encountered financial difficulties during that fiscal year and had incurred a net loss therein of \$274,323.95. Adversity continued to plague the corporation during the fiscal year ending April 30, 1953 (which included almost the entire period covered by the indictment), and it sustained a net loss of \$224,099.32. Part of this loss (the exact extent is vigorously disputed) was attributable to a summer fire which destroyed cut timber and hampered operations. As a result of its intensified financial plight, Coast Redwood Co. initiated proceedings under Chapter Eleven of the Bankruptcy Act on January 30, 1953. It was adjudicated a bankrupt on November 9, 1954.

A study of the past tax record of Coast Redwood Co. fails to reveal a portrait of a dutiful and diligent taxpayer. It had been delinquent in respect to meeting its obligation to pay over withheld income and Social Security taxes to the Government as long ago as 1947 and 1948. Again, at the start of the indictment period (namely, April 1, 1952), Coast Redwood Co. was delinquent in the payment of prior withholding taxes. Pursuant

⁵Early in 1951, appellant sold the sawmill and other assets of Coast Redwood Co. to a Mr. Hull, who paid appellant \$925,000 in cash prior to taking possession of the sawmill in April, 1951. Mr. Hull was unable to make the installment payments required by the agreement of sale and appellant resumed control of these assets in December, 1951. When questioned as to the disposition of the money received from Mr. Hull, appellant stated that it was used "to pay bills and get the property in shape where we could deliver it to Mr. Hull when the time came." [Tr. 668.]

to an understanding reached with the Internal Revenue Service, it was paying off these past obligations at the rate of \$1,000 per week. The sums paid during the indictment period were credited seriatim to the oldest outstanding obligation, in accordance with existing Internal Revenue Service policy where no instructions to the contrary are given. Neither Coast Redwood Co. nor appellant requested or instructed that the sums be applied in any different manner. Accordingly, the monies paid over to the Government during the indictment period, with the exception of the partial third quarter payment, served only to diminish prior obligations and not to pay current liabilities. However, it should be observed that payments made during each quarter of the indictment period and applied to accrued obligations did not in any instance equal or exceed the amount of money withheld and not paid over during that particular quarter.⁶

Appellant has resolutely maintained from the inception of the investigation into Coast Redwood Company's tax situation that the failure to pay the tax obligations on time was ascribable to the lack of sufficient funds. It was not that Coast Redwood Co. never had adequate funds to meet its tax obligations. The corporation's books and accounts completely refute such a contention. Coast Redwood Co. kept two bank accounts which during each month of the indictment period reached

⁶An aggregate amount of \$87,973.00 was paid over to the Collector of Internal Revenue during the indictment period, of which the sum of \$28,919.05 was applied, as noted previously, to the third quarter liability and the balance of which was credited to back taxes which accrued prior to the commencement of the indictment period.

substantial credit amounts, although, it must be added, the general over-all state of these accounts was one of constant overdraft.⁷ It was rather, appellant claims, that Coast Redwood Company's financial resources were so severely drained by the business setbacks it was experiencing in 1952, and it was so beset by other pressing obligations and impatient creditors that it was not possible to pay the Government in full if the corporation was to survive. Consequently, as appellant depicts the scene, Coast Redwood Co. was confronted with a continuing perplexing problem arising from the described predicament—who shall be paid and how much?

Appellant was chief executive officer of the corporation. It was his responsibility to determine how corporate funds should be expended. He was not himself the “disbursing officer” for the corporation, but he had the final word as to what bills should or should not be paid, and when. Possessed of such authority and power, he came within the purview of Section 2707(d) of the I.R.C. of 1939, which defines a “person” subject to the preceding subsections of §2707.⁸ Appellant asserts

⁷Coast Redwood Company's bank accounts can most accurately be characterized as active and fluctuating. The following example vividly illustrates the dynamic state of the corporation's bank accounts. Its commercial account at the Arcadia Branch of the Bank of America showed a balance of \$921.44 on August 8, 1952. The next day the balance was \$18,816.85. And on August 11, 1952, the account showed that \$20.76 was overdrawn.

⁸Section 2707(d) provides as follows:

“The term ‘person’ as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee

that his choice was highly circumscribed. He says he could have paid the Government in full and neglected most of the other creditors entirely. Had he done this, appellant submits, Coast Redwood Co. would have been forced to shut down. He could have apportioned payments of available funds to various creditors, including the Government, and continued in business. Appellant states that he wanted to remain in business, expected and hoped to extricate Coast Redwood Co. from its embarrassed financial status, and planned to pay off all creditors in full. Of course, attainment of his related objectives lay with the latter alternative, which appellant therefore chose to pursue.

In order to stay in business, Coast Redwood Co., according to appellant, had to pay its current trade obligations such as payroll, suppliers, log haulers, insurance, and other similar operating expenses. Otherwise the necessary services rendered by this group of creditors would not have been forthcoming. Accordingly, appellant ordered that these obligations be accorded top priority. An Internal Revenue Service agent quoted appellant as later saying that he was in effect, robbing Peter to pay Paul and the United States was Peter in this instance. The agent testified that appellant also admitted that the Government rated a low priority. Appellant does not deny that the Government was not given first preference but urges in justification of his policy that he was at all

or member is under a duty to perform the act in respect of which the violation occurs."

Appellant does not contest on this appeal the sufficiency of the evidence to support a finding that this provision applies to him. Cf. *Levy v. United States*, 140 F. Supp. 834; *Cushman v. Wood*, 56-2 USTC 9690 (1956); *Wade v. United States*, 54-2 USTC 49,066 (1954).

times trying to do what he thought most likely to assure preservation of the corporation and eventual payment in full to all creditors, including the United States.

Wilson did not seek to conceal his policy or Coast Redwood Company's actual tax liability from the Government. Throughout the indictment period Coast Redwood Co., under appellant's stewardship, filed full, accurate and timely tax returns reflecting the amount of money owed. Appellant acknowledged, and never disclaimed, Coast Redwood Company's tax liabilities. He simply refused to direct their payment.

The operations of Coast Redwood Co. were considerable in scope and volume. During the indictment period its gross receipts totaled \$2,412,635.00 and its total disbursements amounted to \$2,414,263.00. As heretofore noted, Coast Redwood Company's business activities were conducted principally with affiliated corporations. Many of the expenditures and receipts during the nine-month period covered by the indictment involved these affiliates. The inter-corporate dealings and transfers of funds from one entity to another were numerous and complicated. Counsel for both sides devoted much attention and placed much emphasis upon whether these dealings and transfers constituted an affirmative attempt to siphon off available funds to affiliates, and were designed by appellant to evade and defeat the payment of the tax obligations. No useful purpose would be served by encumbering this opinion with compilations of these myriad transactions in light of our disposition of this appeal and the grounds therefor. It suffices to say that the original set of fig-

ures shows a net inflow to Coast Redwood from these dealings; the adjusted journal entries indicate a net outflow resulted from these transactions. A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for non-existent brokerage fees on log cants sold to it, it is also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.

Appellant supports various payments made to affiliates in preference to clearing up the tax obligations on the ground that these payments and in some instances, loans, were necessary to keep the other corporations solvent, and that in view of the interrelationship between his various corporations it was essential to Coast Redwood Company's continued existence that the affiliates remain in business. It should be noted here that the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family. Appellant drew no salary during the indictment period and the corporation never declared or paid a dividend in its ill-fated lifetime.⁹

⁹Two Coast Redwood Co. Checks were drawn to the order of appellant during the indictment period. The first was a \$1,000 check drawn in October, 1952, by an employee acting apparently without appellant's knowledge and consent. It was restored to Coast Redwood Co. the next month. The second was a \$19,000 check issued on November 28, 1952. The sum represented by this check wove a tortuous path through appellant's many corporate entities, but did not come to rest in his account. The sum was transferred to the account of

It should be noted also that appellant's version of Coast Redwood Company's dire financial condition and consequent dilemma, especially the assertion that preservation of the business rested on nonpayment of the tax liabilities, was challenged by the Government and apparently disbelieved by the court below. The District Court was seemingly of the opinion that appellant's explanatory statements, self-serving in character, were not persuasive because the tax obligations represented a mere pittance in the over-all financial dealings of the corporation. Of course, the trier of fact was free to discount appellant's testimony and no error was committed thereby. Appellant's defense has been here considered at length, not to permit an appellate tribunal to "second guess" a trial court on a factual issue, but to highlight the especial significance of the constituent mental element of the offense under the circumstances of the instant case.

Another facet of the instant fact situation deserves mention. Appellant and representatives of the Internal Revenue Service conferred from time to time during the indictment period regarding the matter of Coast Redwood Company's tax delinquencies. Invariably these conferences culminated in a promise by appellant that the corpo-

A. K. Wilson Lumber Co., which treated the transaction as a Transfer of funds from Coast Redwood Co. to Union Bond, and from Union Bond to A. K. Wilson Lumber Co.

The Government also sought to establish that appellant was depleting the funds of A. K. Wilson Lumber Co. and thus indirectly siphoning Coast Redwood Co. funds. The basic premise of the Government's charge is that funds were transferred from Coast Redwood Co. to A. K. Wilson Lumber Co. or A. K. Wilson Lumber Co. refused to pay its obligations to Coast Redwood Co. for tax evasion motives. Consequently, the textual discussion covers this point.

ration would, among other things, make regular installment payments of a certain sum or would settle its tax liabilities by a certain date. Just as invariably, for one reason or another, Coast Redwood Co. never fulfilled its undertakings. Nevertheless, the Internal Revenue Service acquiesced repeatedly in the delays and refrained from seizing the corporation's property in the hope that the business could be preserved; the same hope appellant urges was motivating him. Unfortunately, appellant's expectation proved groundless and his hopes were dashed. Coast Redwood Co. collapsed and was ultimately adjudicated a bankrupt. Had events taken a different turn, this case might not be before us."

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court committed error in finding appellant guilty, in view of the Court's frank acknowledgment that it would be impossible to make a new determination of the guilt or innocence of the defendant on the basis of evidence heard and received two years earlier. (R. 75, 121, 124, 130, 140-2.)
2. The Court committed error in failing to accept the decision of the Court of Appeals that the trial Court had previously held an erroneous view of the law, and in again finding appellant guilty on the basis of the same view of the law as the trial Court had at the time of the first judgment. (R. 75, 78-82, 140-2.)
3. The Court committed error in undertaking to determine the guilt or innocence of appellant on the basis of the former record two years after hearing the

testimony and after having originally found appellant guilty on an erroneous theory of law. (R. 75, 78-82, 130-1, 140-2.)

4. The Court committed error in denying appellant's motion for acquittal as to each count, made at the close of appellee's case and also at the close of all the evidence. The ground on which the motions were made was that there was no substantial evidence to show the commission of any of the offenses charged in the indictment. (O.R. 539-40, 880-1.)

5. The Court committed error in sustaining the objection to appellant's offer to prove that in May, 1955, through his attorney, Mr. James Dezendorf, of Portland, Oregon, he held discussions with the representatives of the Internal Revenue Service in Portland, Oregon, including the District Director, relating to the Coast Redwood Company's withholding tax liabilities for the year 1952; that he was informed by the District Director that arrangements for the security and payment of those taxes could be made with the District Director's office in Portland; that he had checked with the District Director in San Francisco and had been so advised; that agreements were reached which were reduced to writing which provided in substance that the appellant would cause to have transferred to Mr. Dezendorf the title to various properties in which Coast Redwood Company had no interest; that Mr. Dezendorf would execute a mortgage to these properties which would provide that they were being held as security for the United States Government to secure all of the tax liabilities of the defend-

ant, A. K. Wilson, of members of his family and of all corporations controlled by A. K. Wilson or members of his family, including Coast Redwood Company; that an orderly liquidation of the mortgaged property would be made by means of sales, and upon the making of the sales the net proceeds from the sales would be paid to the District Director in Portland to be applied in liquidation of the tax liabilities secured; that thereafter following the execution and recordation of the mortgage mentioned, certain sales of property were held and proceeds in the amount of \$111,000.00 were delivered by Mr. Dezendorf to the District Director in Portland with the direction that they be applied to the Coast Redwood Company withholding tax liabilities for the year 1952; that thereafter Mr. Dezendorf, acting for appellant, arranged for the sale of certain other properties which were not covered by the mortgage and in which the Coast Redwood Company had no interest, and that the sum of \$103,000.00 was realized from the sale of that property and was delivered to the District Director in Portland with the direction to apply it to the Coast Redwood Company's withholding tax liabilities; that prior to the execution of the agreement with the District Director and the recordation of the mortgage in question, the District Director informed Mr. Dezendorf that before he could reach any agreement he would have to investigate the adequacy of the property as security for the total taxes in question; that thereafter he informed Mr. Dezendorf that he had made an appraisal of the property and was satisfied that it was more

than adequate to cover all of the taxes involved in the agreement. Objection to this offer of proof was made on the ground that it was immaterial and remote (O.R. 765, 773) and the further ground that the District Director in Portland had no authority to enter into such an agreement. (O.R. 773.) The objection was sustained on the specific ground that, assuming all the proposed matters of proof to be true, they were not material. (O.R. 774.)

SUMMARY OF ARGUMENT.

A. The Lower Court Did Not Comply With the Mandate.

The mandate of this Court called for a reconsideration of the evidence in the light of the correct rule of law as to the necessity for proof of evil intent, and for special findings of fact. Appellee so construed the mandate and presented its case accordingly. The language and context of the amendatory order of this Court, in modifying its original opinion, leave little room for contending otherwise.

The trial Court, however, held that a reconsideration of the evidence after two years was an impossible task which it would not undertake. As a result, it did not make a new determination of guilt or innocence, nor did it attempt to make any special findings. Instead, it made a finding that its view of the law had always been the same as that announced by the Court of Appeals, and on that basis it again found appellant guilty.

In effect, all that the trial Court did was to review (and disagree with) the Appellate Court's decision that the original judgment had been based on incorrect legal principles. That question was not open to consideration on the remand, and in any event the opinion on the prior appeal clearly shows that an incorrect rule of law was applied.

A redetermination of appellant's guilt or innocence, on the basis of a reappraisal of the evidence, which the remand contemplated, was not made.

B. The Remand for Reconsideration Was Itself Improper.

The proceedings on remand show that the Court should not have modified its original order for a retrial. The trial judge disagreed with the conclusions reached by this Court, he stated that his position was embarrassing and that he would have preferred an order for retrial, and he refused to reconsider the evidence and to make special findings on the ground that to do so was impossible.

As stated in the original opinion of this Court, the determination of factual questions on the basis of erroneous legal principles is just as erroneous when done by a judge as when done by a jury; and the error should in both situations be corrected in the same manner, namely, a retrial. A redetermination of factual questions two years after the trial does not protect the rights of defendants and imposes unfair and impossible burdens on those who are asked to reappraise and reweigh the evidence and decide what inferences to draw therefrom.

C. The Conviction Is Not Supported by Substantial Evidence.

There is no evidence of deceptive or fraudulent practices. Appellant was struggling with a practical situation. Coast Redwood was operating at a substantial loss, and its obligations to trade creditors were increasing even more than its withholding tax obligations. It was necessary to make payments to trade creditors for current purchases and services in order to keep going, and appellant's decision to do this was known to the Internal Revenue representatives and acquiesced in by them. If his judgment was bad, so was theirs; but such errors in judgment cannot support tax evasion convictions.

The new legislation enacted by Congress early in 1958, after the decision of this Court on the prior appeal, shows that Congress does not consider felony tax evasion prosecution the appropriate remedy for business decisions which are the result of economic hardship rather than fraudulent motivation. This legislation calls for specific personal notice to the responsible party of the delinquency in withholding tax payments, and provides that failure thereafter to deposit the withheld taxes immediately in a special account is a misdemeanor, regardless of whether or not funds are available.

D. Appellant Should Have Been Permitted to Show His Subsequent Payment of the Taxes.

There was a continuous course of conduct directed toward payment of the taxes in question, beginning in the indictment period and culminating in actual payment of the taxes out of funds in which Coast Red-

wood had no interest, after a security arrangement had been negotiated in 1955. Even though the security negotiations and the actual payment occurred two to three years after the liabilities arose, they had a bearing on appellant's good faith and lack of evil motive to evade payment, particularly since they were a part of a continuous course of conduct starting in 1952. The remoteness of time relates to the weight rather than to the relevance of this evidence.

ARGUMENT.

- A. THE LOWER COURT DID NOT COMPLY WITH THE MANDATE OF THIS COURT TO RECONSIDER THE CASE AND TO MAKE FINDINGS IN THE LIGHT OF THIS COURT'S OPINION.**
(Specification of Errors Nos. 1 and 2.)

The opinion of this Court on the former appeal clearly shows that the trial judge had found appellant guilty on an erroneous legal theory. The lengthy excerpts from the record cited in the opinion leave no possible doubt on this point. Nevertheless, the trial Court took the position, on the remand, that it had applied the correct rule of law in the first instance, and had never held any view of the law contrary to the principles announced by this Court. Accordingly, the trial Court said (R. 121-2):

“So that the record may be clear again, there is nothing new, in my opinion, in the statement of law as made in the Court of Appeals. I am not only bound by it, but I am in thorough agreement with it. I have never had any contrary views to that stated by the Court of Appeals with respect

to the necessity of tax evasion motive and wilfulness being present. Despite what is said in the Opinion, I never indicated anything to the contrary.’’⁵

The trial Court’s “reconsideration” of the case did not involve any reappraisal (or even attempted reappraisal) of the evidence, nor did the Court attempt to make any findings in the nature of special findings. It made only two “findings”, as follows: (1) that the trial Court’s conception of the constituent elements of the offense was the same as it had been at the time of the original judgment, namely, that a conviction required proof beyond reasonable doubt that appellant had wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment; and (2) that appellant “wilfully and with the evil motive of tax evasion did commit said acts.” (R. 81-2.)

As already stated, the trial Court specifically declared that a redetermination of appellant’s guilt or innocence was impossible. (R. 124, 121.)

1. The Mandate Called for Reconsideration of the Question of Guilt.

The original opinion of this Court called for a remand of the case for a new trial. (R. 35.) Appellee’s Petition for Rehearing En Banc (not printed) asked the Court to affirm the conviction or, in the alternative, to remand the case “for special findings pursu-

⁵This statement cannot be reconciled with the remarks of the trial Court quoted in footnote 13 of this Court’s Opinion (R. 25-30).

ant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial'' (p. 11.) After pointing out that the trial had consumed nine days, appellee stated (Petition for Rehearing, p. 11):

''To require retrial solely for the purpose of affording the trial court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court's opinion would entail unnecessary expenditure of time and money. There being no other error, it is manifest that the trial court *having the record before it* could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant's specific wilful intent to evade payment of the withheld taxes.'' (Italics added.)

The Court then amended its opinion to provide for a remand to the District Court ''for reconsideration in accordance with the principles set forth in this opinion and for further findings . . .'' (R. 36.)

We think it is clear that the mandate called for a reconsideration of the evidence and a new look at the question of guilt or innocence, all in the light of the correct rule of law announced by this Court.

Appellee itself obviously interpreted the mandate as calling for reconsideration of the evidence, since it submitted, on its own initiative, lengthy proposed special findings (R. 40-59) which contain numerous detailed references to the testimony.

Furthermore, at the outset of the remand hearing, appellee's counsel stated that the trial Court

“. . . is under instructions from the Court of Appeals to reconsider the evidence in this case for the purpose of making findings. . . .” (R. 87.)

Similarly, counsel said that the facts had to be reviewed to see whether or not they make out the requisite state of mind (R. 90), and he argued the evidence at length. (R. 90-9.)

After the trial Court had stated that “. . . it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event” (R. 121), appellee’s counsel expressed the assurance that the Court was still sufficiently familiar with the facts (R. 122-3) and urged the Court to relate its finding, “whatever it might be . . . to certain of the significant pieces of evidence in the case upon which the finding is based.” (R. 124.)

The judgment of guilt without a reappraisal of the evidence violates the premise upon which appellee persuaded this Court to modify its remand, namely, that the trial Court’s familiarity with the record made the time and expense of a new trial unnecessary.

2. The Mandate Called for Special Findings.

Appellee’s Petition for Rehearing En Banc, in urging a remand for reconsideration rather than for retrial, stated (p. 11) that “. . . the trial court having the record before it could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant’s specific wilful intent to evade payment of the withheld taxes.”

This was an unambiguous and unequivocal request for a remand for special findings; and, in the context and posture of the case, we think the Court's modification of its opinion similarly called for special findings to be made.

Appellee proposed special findings before the lower court after the remand (R. 40-59), as did appellant. (R. 59-78.)

Even after the lower court had expressed the view that the mandate did not call for special findings and that it would be impossible to make them (R. 121, 124, 131, 132, 135), counsel for appellee expressed the view that the Court of Appeals had, in effect, made a motion for special findings under Rule 23 on behalf of appellant (R. 126), urged the Court to make special findings (R. 124), and specifically stated that in appellee's opinion "*. . . it was the contemplation of the Court that the special findings should be made whether or not new evidence was introduced.*" (R. 134, italics added.)

Appellant urged upon the lower court the view that the mandate called for findings which set forth the particular acts considered to be the tax evasion conduct and stated whether those acts were done with or without the requisite evil intent. (R. 130.) The trial Court took the view, however, that what this Court wanted was not so much a finding as to the appellant's conduct as a finding as to the state of mind of the trial Court regarding the applicable law. (See the Opinion, Findings and Decision of the lower court, R.

78-82, as well as the remarks of the Court during the remand hearing, R. 131.)

B. THE REMAND FOR RECONSIDERATION, RATHER THAN RETRIAL, WAS IMPROPER. (Specification of Error No. 3.)

We have previously presented this point to the Court, in our Petition for Rehearing and Petition for Recall of Mandate and For Leave to File Petition for Rehearing, in No. 15,301, and ordinarily we would be reluctant to argue the point again. The proceedings on the remand in this case however, illustrate the problems created by such a remand so graphically that we believe further discussion is in order.

First of all, the trial judge rejected this Court's conclusion that an erroneous rule of law had been applied. This is apparent not only from the trial Court's written Opinion, Findings, and Decision (R. 78-82), but from numerous statements made by the Court during the course of the remand hearing. (R. 121-2, 131, 138.)

Secondly, the trial Court found its position on the remand an embarrassing one, and expressed the wish that the Court of Appeals had ordered a retrial. (R. 131.) The determination of criminal guilt or innocence should be divorced from factors of personal embarrassment, and this should be just as true of a judge passing on factual issues as it is of a jury.

Finally, the trial Court declared a reconsideration of the evidence impossible, as already shown at length earlier in this brief. Thus, what we had feared has

fully materialized; and, through the frankness of the trial judge in recognizing and acknowledging the situation, we know that there was no reconsideration of the case, and no reappraisal of the evidence. What was intended by this Court to be a redetermination of the guilt or innocence of the appellant became instead a review of the conclusions reached by this Court.

Accordingly, without repeating herein the arguments and authorities set forth in our Petition for Rehearing in No. 15,301, we urge the Court to reconsider the propriety of the type of remand made here.

We also call attention to the Third Circuit's recent treatment of a similar problem in *United States v. Palermo*, 259 F.2d 872 (October 2, 1958), 58-2 U.S.T.C. Par. 9850. The defendant had been found guilty by the Court, in a non-jury trial, on two misdemeanor counts of wilful failure to pay his income taxes. Relying largely on the Ninth Circuit's holdings in *Bloch v. United States*, 221 F.2d 786 (9th Cir. 1955), *Forster v. United States*, 237 F.2d 617 (9th Cir. 1956), and the instant case (*Wilson v. United States*, 250 F.2d 312 (9th Cir. 1958)), the Third Circuit held that the trial judge had applied the wrong standard of wilfulness and remanded the case, for retrial as to one count and dismissal as to the other.

In another recent case, the Third Circuit expressed grave concern over a two months' interruption in a jury trial brought about by the defendant's health. *United States v. Alker*, F.2d (Sept. 10, 1958), 58-2 U.S.T.C. Par. 9829. The Court, raising the question on its own initiative, deemed it appropriate to

frown on this practice as “hardly . . . commensurate with the minimal standards required for the efficient administration of justice.” Since appellant had requested the continuance and was not claiming prejudice from it, there was no reversible error, but the Court admonished that in such situations the Court should avoid long interruptions by either forcing the defendant’s presence through revocation of bail or declaring a mistrial.

The same concern applies here. In effect, there was a delay of two years while the correct rule of law to be applied was determined, and the trial Court was then asked to reconsider the case on the evidence previously taken. Since the trial judge said this was an impossible task which he would not undertake, the practicability and fairness of such a project has become wholly theoretical in this case. Nevertheless, we submit that even from purely a conceptual approach, a partial remand of this kind presents grave risks to accurate and objective appraisal of testimony by the trier of facts.

C. THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE CONVICTION. (Specification of Error No. 4.)

We respectfully submit that the most careful reading of the record fails to show any substantial evidentiary basis for the conclusion that appellant engaged in acts motivated by tax evasion. Not only is there a complete absence of any concealment or deception, but there is on the contrary a record of full and honest disclosure of the tax liabilities, and of continuous con-

temporaneous discussion with the Internal Revenue representatives of the financial problems of Coast Redwood and of the means by which appellant hoped to resolve them. The Internal Revenue representatives knew what he was doing, and they acquiesced in his conduct because of their own belief that this conduct would be preferable to shutting down the business through their exercise of the warrants for distraint which they held.

Had the Court made special findings, the pertinent facts could have been related to each finding to test the sufficiency of the evidence. Since the Court made only a general finding, we have no way of determining what particular acts the Court considered to be the means of the attempted evasion, nor do we know what evidence was the basis for determining that the conduct was motivated by the desire to evade payment of the taxes.

In its opinion on the prior appeal, this Court said (R. 33) that all of the following possibilities existed, and that a verdict following any of them would be sustained if based on the correct rule of law: (a) appellant directed the disbursements in good faith and solely to preserve the business, or he acted in part to evade or defeat payment of the taxes; (b) the disbursements were not made with intent to evade, but the failure to pay was motivated by a desire to evade payment, in which case appellant would be guilty only of a misdemeanor (rather than the felony for which he was tried); (c) appellant did not commit any crime, and could be held liable only civilly.

This statement was by way of dictum and does not, of course, constitute a holding. It was placed in the opinion to illustrate the importance of applying the correct rules of law in weighing the evidence. Had there been a retrial, as first ordered, this observation of the Court would not have had any significance in the subsequent proceedings. Appellee will no doubt contend, however, that this statement is for practical purposes a holding that the evidence is sufficient; and for that reason we present some further argument instead of simply directing the Court's attention to the briefs filed on the first appeal.

One factual matter which was not before this Court on the prior appeal but which has been included in this record is that appellant had in fact been negotiating for a sale of Coast Redwood's properties during the fall of 1952, just as he had stated to the Internal Revenue Service representatives when asking for additional time to pay the delinquencies. One of the special findings proposed by appellee on the remand was that appellant had made misleading statements to the Internal Revenue Service representatives to the effect that he was negotiating for a loan or sale of properties. (R. 49-50.) In objecting to such a finding on the ground there was no evidence to support it (R. 63-4), appellant attached a verbatim transcript (R. 76-8) of that portion of the proceedings at the time of the original sentencing which showed that the trial judge was satisfied from the pre-sentence investigation that such negotiations had in fact been carried on extensively.

We mention this because it clearly eliminates any basis for contending that at the time of the remand the Court considered any such alleged "misrepresentations" as the tax evasion conduct.

Similarly, both the lower court and the prosecutor specifically renounced any thought that the failure to live up to the agreement of August 28, 1952, could be a basis for conviction. (O.R. 329.)

As the opinion on the prior appeal states (R. 5), the facts of this case "do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases."

The indictment (O.R. 3-12) alleged that the attempt to evade was made by the following means:

(1) By failing and refusing to pay said withheld taxes;

(2) By causing said corporation to fail and refuse to pay said taxes;

(3) By withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of appellant and of corporations owned and controlled by appellant and members of his family; and

(4) By causing said corporation to use its funds to pay creditors other than the United States.

The first and second of these, even if done with the necessary evil intent, would at most establish only the misdemeanor proscribed by Section 2707(b) of the Internal Revenue Code of 1939, not the 2707(c) felony alleged in the indictment.

The other two means alleged in the indictment simply are not supported by evidence showing either the factual assumptions of the indictment or the existence of any evil intent. In its prior consideration of the case, this Court concluded that

“... the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family” (R. 13);

and that

“... it does not appear that Coast Redwood Co. flagrantly favored, or was favored by its affiliates” (R. 12.)

The Court's opinion also recognized that, in order to stay in business, Coast Redwood had to pay its current trade obligations, and that appellant accorded them top priority. (R. 11.) It may be added that this was done with the contemporaneous knowledge and acquiescence of the Internal Revenue collection representatives (O.R. 848) and therefore cannot be considered a deceptive or fraudulent practice. It was simply a judgment decision shared by the collection officers.

Moreover, the payments to trade creditors during the indictment period were less than the value of the goods and services obtained from them. The total obligations to the various classes of trade creditors increased by \$93,474.95 between April 1 and December 31, 1952 (O.R. 339-42); and this was in addition to the increase in stumpage liability to affiliates in the net amount of \$45,191.00. (O.R. 307.)

We have not repeated here the detailed discussion of the evidence set forth in our opening and reply briefs on the prior appeal, particularly since the Court's opinion summarizes the facts in considerable detail.

The Court's attention is, however, directed particularly to one facet of the case not previously discussed, in the light of the recent decision in *United States v. Palermo*, 259 F.2d 872 (Oct. 2, 1958), 58-2 U.S.T.C. Par. 9850. The defendant there was convicted in a non-jury trial on two counts of wilful failure to pay delinquent income taxes. In setting aside the conviction because of the application of erroneous legal principles relating to wilfulness, the Court directed a retrial as to one year only, and ordered a dismissal as to the other. The reason for the dismissal was that, in the year involved, the defendant had paid on delinquent accounts from prior years substantially more than the current year's unpaid liability. Accordingly, the Court held that there could be no substantial basis for finding wilfulness as to that year, notwithstanding evidence of lavish personal expenditures.

The situation here is quite similar, except that appellant was not living lavishly and was not drawing even a salary from Coast Redwood. The withholding tax payroll deductions for the third and fourth quarters of 1952 were not greatly in excess of the payments actually made, although the bulk of the payments were, by agreement, credited to prior delinquencies. The following table shows the total deductions and

the amounts paid (or set aside in a special account and subsequently paid over) for each quarter:

Period	Total Deductions	Amount Paid or Set Aside
2nd Quarter, 1952	\$ 55,473.17	\$14,054.42
3rd Quarter, 1952	48,332.32	41,419.05 ⁶
4th Quarter, 1952	43,193.07	42,500.00 ⁷
	<hr/> \$146,998.56	<hr/> \$97,973.47

The payments during the second quarter of 1952 were far below the payroll deductions, but it may be noted that the conduct principally relied upon by appellee occurred during the third and fourth quarters. Thus, in the proposed special findings submitted by appellee, in the section entitled "The Affirmative Acts Involved in the Offense of Wilful Attempt to Evade or Defeat Payment of Taxes" (R. 47-54), the earliest date of any of the alleged acts is July, 1952 (except for the general allegations which describe the total amount of inter-company transactions by reference to the entire period.)

This Court's conclusion that evil motivation is required to make out the felony of evasion of payment of withholding taxes is reinforced by subsequent Con-

⁶Includes \$28,919.05 which was set aside in a special bank account and paid with the 3rd quarter return when it was filed on October 31, 1952.

⁷Includes four weekly payments of \$2,500.00 made in January, 1953. Two of these checks, totalling \$5,000.00, did not clear Coast Redwood's account prior to the commencement of the Chapter 11 proceedings, and accordingly were not honored by the bank. (O.R. 797-8.)

gressional legislation. Following the original decision in this case, Congress enacted H.R. 8865 (signed by the President on February 11, 1958), which added Sections 7215 and 7512 of the Internal Revenue Code of 1954 (U. S. Code, Title 26, Sections 7215 and 7512.) These sections provide, in substance, that when there is a delinquency in payment of withholding taxes, the responsible party may be notified personally of the delinquency, and thereafter he must deposit the withheld taxes in a special account not later than the second banking day after the payroll deduction is made. Failure to do so is a *misdemeanor*, and a lack of funds immediately after the payroll payment is not a defense.

The Senate Report on H.R. 8865 states that the felony tax evasion provision is not an appropriate or adequate enforcement aid because the Courts "generally have refused to treat as 'wilful' those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government." S.R. 1182, 85th Congress, First Session, January 23, 1958; 1958, U. S. Code Cong. & Adm. News, pp. 255, 257.

Thus, when confronted specifically with the type of problem which this case exemplifies, Congress felt that there should be no criminal offense at all without a prior warning notice, and even then felt that non-compliance with the notice should be a misdemeanor rather than a felony. Had this new legislation been

in effect in 1952, the Internal Revenue authorities would undoubtedly have utilized it. But the delay in formulating an appropriate enforcement provision does not justify a tortured view of the facts so as to make criminal wilfulness out of what is essentially nothing more than economic hardship.

D. APPELLANT SHOULD HAVE BEEN PERMITTED TO SHOW HIS CONTINUOUS EFFORTS TO PAY, AND HIS SUBSEQUENT PAYMENT OF, THE TAXES IN QUESTION. (Specification of Error No. 5.)

We refer the Court to the argument on this point in our Brief for Appellant (pp. 36-8) in the prior appeal. (On that appeal, the Court concluded that the exclusion of the details of the negotiations, as distinguished from the fact thereof, was not an abuse of discretion.)

CONCLUSION.

The failure to comply with the mandate of this Court requires that the case again be remanded. In view of the trial judge's statement that reconsideration of the trial evidence is impossible because of the passage of time, it would be pointless to send the case back for that purpose. The case should be remanded, therefore, for either retrial or acquittal. There is no substantial evidence to show a wilful attempt to evade payment of the taxes, and presumably no further proof exists, since appellee did not utilize its

opportunity to present further evidence at the remand hearing. Accordingly, a dismissal should be ordered.

Dated, Oakland, California,
December 15, 1958.

Respectfully submitted,

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(Appendix Follows.)

Appendix.



Appendix Re Exhibits

(page references are to Original Record
on prior appeal, No. 15,301)

Exhibit No.	Identified	Offered	Received	Rejected
1	106	107	107	
2	106	107	107	
3	111	111	111	
4	111	111	111	
5	112	112	112	
6	112	112	112	
7	129	129	129	
8	144	144	144	
9	145	145	145	
10	145	145	145	
11	151	151	151	
12	168	172	172	
13	170	172	172	
14	170	172	172	
15	180	180	180	
16	198	198	198	
17	207	207	207	
18	210	210	210	
19	216	216	216	
20	219	219	219	
21	226	226	226	
22	229	229	229	
23	230	230	230	
24	231	231	231	
25	234	234	234	
26	234	235	235	
27	236	236	236	
28	236	236	236	
29	238	239	239	
30	240	240	240	
31	243	243	243	
32	244	244	244	
33	266	266	266	
34	268	268	268	

Exhibit No.	Identified	Offered	Received	Rejected
35	277	277	277	
36	281			
37	281	281	281	
38	361	361	361	
39	384	384	384	
40	385	385	385	
41	387	387	387	
42	388	388	388	
43	389	390		
43A	406	405	406	
43B	406	405	406	529
44	473	477	478	
45	473	477	478	
46	474	477		
47	476	477		
48	519			
49	666	666	666	
50	830	830	830	
51	850	850	850	
52	871	871	871	
A	492	491	492	
B	494	494, 503		506
C	617	618	618	
D	730	739		739
E	759	759	759	
F	776	776	776	
G	781	781	781	
H	784	783	784	
I	784	784	784	
J	784	784	784	
K	784	784	784	
L	785	785	785	
M	792	792	792	

No. 16,184

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ARTHUR KING WILSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

BRIEF FOR THE UNITED STATES OF AMERICA.

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FILED

JAN 26 1959

PAUL P. O'BRIEN: CLE

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Table of Authorities Cited

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Marron v. United States (C.C.A. 9th 1926) 18 F. 2d 218, affirmed, 275 U. S. 192, 48 S. Ct. 74, 72 L. ed. 231 . . .	18, 20, 21
United States v. Cole (D.C.S.D.Cal. 1950) 90 F. Supp. 147	11
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No. 16,184

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ARTHUR KING WILSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

BRIEF FOR THE UNITED STATES OF AMERICA.

OPINION BELOW.

The opinion of the District Court, from which this appeal is taken, was handed down in writing on July 28, 1958, and filed the same date. (R. 78-82.)

JURISDICTION.

On November 16, 1955, an indictment in six counts was filed against appellant in the United States District Court for the Northern District of California, Southern Division, charging willful attempt to defeat and evade the payment of federal income taxes and

Federal Insurance Contributions Act (Social Security) taxes withheld from the wages of employees of the Coast Redwood Company, Inc., for the second, third and fourth quarters of 1952 in violation of Section 2707(c), Internal Revenue Code of 1939 (Title 26, U.S.C. (1939 ed.), Sec. 2707(c)).

Trial by jury was waived and appellant was found guilty as charged. Sentence was imposed on August 2, 1956. Jurisdiction was conferred on the District Court by Title 18, U.S.C., Sec. 3231, and Rule 18, Federal Rules of Criminal Procedure.

On November 14, 1957, this court entered an opinion reversing the conviction and remanding the case to the district court for retrial in accordance with the principles set forth in this opinion. (R. 3-35.) After petition for rehearing was filed by appellee on February 27, 1958, this court entered an order modifying its original remand for retrial to a remand for reconsideration and for further findings if additional evidence was adduced by either party. (R. 36.) On petition for rehearing and for recall of mandate and for leave to file petition for rehearing by appellant, this court on April 16, 1958, made a further order and opinion denying the petition for rehearing and denying the petition for recall of mandate. (R. 38-40.) Thereafter, on July 18, 1958, further hearing was held by the district court as directed by this Honorable Court (R. 86-142), and on July 28, 1958, District Judge Louis E. Goodman rendered a decision finding the appellant guilty of the charges set out in Counts 1 to 6 of the indictment. On August 8, 1958, the ap-

pellant was sentenced to 18 months imprisonment and a fine of \$5,000 on Count 1 of the indictment, and a sentence of 18 months on each of Counts 2, 3, 4, 5 and 6 of the indictment, to run concurrently with the sentence imposed on Count 1. (R. 82-84.) Notice of appeal was filed by appellant on August 8, 1958. (R. 84-86.) Jurisdiction of this court is invoked under Title 28, U.S.C., Secs. 1291, 1294.

STATEMENT OF THE CASE.

On February 27, 1958, this court remanded the appellant's case, *Wilson v. United States*, 250 F. 2d 312, to the district court as follows (R. 36):

“The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.”

The mandate was returned to the district court on March 7, 1958, and the appellant then filed a Petition for Rehearing and a Petition for Recall of Mandate and for Leave to File Petition for Rehearing. The above petition was denied in a written opinion by this court on April 16, 1958, *Wilson v. United States*, 254 F. 2d 391. (R. 38-40.)

Pursuant to the above remand, the matter came regularly on for hearing before District Judge Louis

E. Goodman on July 18, 1958. (R. 86-87.) After a statement by Asst. U. S. Atty. Robert H. Schnacke (R. 87-99), a statement by Spurgeon Avakian, attorney for appellant (R. 99-119), a statement by the court (R. 119-122), a further statement by Mr. Schnacke (R. 122-126), a further statement by Mr. Avakian (R. 127-131), and further colloquy between the court and counsel, the matter was submitted without further evidence being adduced by either the United States or the appellant (R. 131-142).

In his written opinion filed on July 28, 1958, Judge Goodman stated in pertinent part:

“ . . . Upon appeal, the Court of Appeals, reversed the judgment of conviction and remanded the cause to this Court ‘for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.’

“The Government elected not to introduce any further evidence. Hence the defendant made no evidentiary response. The Court thereupon heard arguments of counsel with respect to the reconsideration of its former decision. *I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel.*” [Italics supplied.]

“ . . . It is sufficient to say that at the time of decision the Court adjudged the defendant guilty

because it was convinced beyond a reasonable doubt that defendant had wilfully and for the evil motive of tax evasion affirmatively committed the acts charged in the indictment.”

* * * *

“Findings

“The Court finds that its ‘conception of the constituent elements of the offense’ is the same now as it was at the time of judgment, namely that for a conviction the evidence must show beyond a reasonable doubt the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment in violation of Section 2707(c) of the Internal Revenue Code of 1939.

“The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts.” [Italics supplied.] (R. 78-82.)

STATUTE INVOLVED.

Title 26, United States Code, Section 2707(c):

“(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than \$10,000, or im-

prisoned for not more than five years, or both, together with the costs of prosecution.”

QUESTIONS PRESENTED.

1. Did the district court comply with the mandate of the Court of Appeals expressed in its opinion of November 14, 1957, as amended by order of February 27, 1958?

2. Should the Court of Appeals reverse its decisions on the following questions:

(a) Was the partial remand entered in this case by this Honorable Court on February 27, 1958, proper, as so determined by written opinion filed April 16, 1958? (R. 38-40.)

(b) Was the evidence sufficient to sustain the verdict, as so decided by this Honorable Court in its opinion entered herein on November 14, 1957? (R. 3-38.)

(c) Was there no error in the exclusion of evidence that appellant, through his attorney, had negotiated and entered into an understanding and agreement with representatives of the Internal Revenue Service in 1955, as so decided by this Honorable Court in the opinion entered herein on November 14, 1957? (R. 3-35, at pages 34 and 35.)

SUMMARY OF ARGUMENT.

I. The District Court Wholly Complied With the Mandate of the Court of Appeals.

The remand of the Court of Appeals filed on February 27, 1958, as an amendment to the original opinion of the court filed on November 14, 1957, called for two actions on the part of the district court:

(1) Reconsideration of the case by the district court in accordance with the principles set forth in the opinion of November 14, 1957; and

(2) Further findings after additional evidence, if any, has been introduced by the Government and/or the appellant.

The second portion of the remand became moot upon the failure of either party to this controversy to introduce additional evidence. The proper interpretation of the first portion of the remand for reconsideration of the case in accordance with the principles set forth in the opinion of November 14, 1957, therefore becomes the only substantial issue on this appeal.

It is the position of the Government and was the position of the trial court that the first portion of the remand required the trial judge to make a finding as to whether or not he had the proper conception of the degree of proof of willfulness required to establish attempted evasion of the payment of tax. Since this was obviously a subjective matter the question could only be completely and correctly answered by the trial judge; although, as the Court of Appeals observed in its original opinion, his comments made

during the course of trial made it seem as though he had not used the correct standards as delineated in that opinion. (The Court of Appeals also noted that comments in the heat of trial are not a reliable measure of this factor in all cases.) By a written opinion, findings and conclusions dated July 28, 1958, the trial judge held that he had used the proper criterion in determining the presence of willfulness in formulating his original decision and that he was then and now is of the opinion that the evidence adduced by the Government convinced him beyond a reasonable doubt that the appellant was guilty of tax evasion and, particularly, that he was convinced beyond a reasonable doubt that appellant's actions as shown by the Government evinces his evil motive to evade taxes. Such a finding, of course, precludes any necessity for the trial judge to make specific detailed findings of fact and conclusions of law from the original record.

Appellant would construe the mandate to require a full scale detailed statement of facts and conclusions of law on the part of the district court or, in short, that he should have had a new trial based upon the record of the first trial. It is the position of the Government that the mandate was a partial mandate (as is argued elsewhere by the appellant in his brief) and that it was confined to the resolution of the only issue in this case; to wit: whether he applied the proper conception of the law to the facts at the time of his original decision and that appellant's construction of the mandate would compel the trial judge to perform useless and idle acts.

II. The Previous Opinions Entered Into by the Court of Appeals in This Controversy Have Adjudicated the Other Questions Raised by Appellant.

It is the position of the Government that the remaining questions raised in appellant's brief have been adjudicated by this Honorable Court in its opinions of November 14, 1957, as amended by order of February 27, 1958, and of April 16, 1958, and that, therefore, the appellant should be adjudged bound by these opinions which constitute the rule of the case on this appeal.

(a) Appellant argues that the action of the Court of Appeals in remanding the instant case for reconsideration in accordance with the principles expressed in the opinion of November 14, 1957, as amended by order of February 27, 1958, was improper. His arguments on this score, which have heretofore been embodied in a document entitled "Petition for Rehearing and Petition for Recall of Mandate and for Leave to File Petition for Rehearing," were considered by this court and on April 16, 1958, by written opinion, this court determined the remand to be proper.

(b) Appellant argues that the conviction in this case was not supported by substantial evidence. The opinion of this court dated November 14, 1957, clearly stated that if the trial court had in mind the proper principles of law there was no question but what the facts proved by the Government would be sufficient to support the verdict. Since the trial judge has now stated that he had the proper requirements of the law in mind at the time of his original decision, appellant should not be permitted once again to question the sufficiency of the evidence.

(c) Appellant argues that he should have been permitted to put in evidence a showing of certain negotiations looking toward payment of taxes which took place long after the investigation and indictment in this case. This same question was decided against appellant after full consideration of his arguments by this court in its opinion of November 14, 1957.

ARGUMENT.

I.

THE DISTRICT COURT WHOLLY COMPLIED WITH THE MANDATE OF THE COURT OF APPEALS.

Appellant's principal contention upon this appeal is that the mandate of the Court of Appeals required the trial court to reconsider all of the evidence adduced in the original trial of this case and to make special findings of fact which set forth the particular acts considered to be the "tax evasion conduct" and to state whether those acts were done with or without the requisite evil intent. It is the position of the Government that the reconsideration to be given by the trial court was directed to the sole issue of whether or not the trial judge had the proper principles of law in mind at the time of his original decision; that if he did, then it was clear that the evidence would support the verdict; that if the trial judge did not have the proper principles in mind at the time of rendering his original decision, then and then only would he be required to make a new determination as to whether or not the appellant had the

specific evil intent to evade the payment of taxes. In either event, it is the position of the Government that the specific detailing of alleged particular acts considered to be tax evasion conduct was nowise contemplated by the mandate. It is a hornbook principle of criminal law that intent must be drawn from the myriad of small details which go to make up the conduct of the defendant during the period in question and cannot, and should not, be tied down to specific individual acts.

Intent is, of course, a subjective matter and not subject to direct proof. The reason why the appellant indulged in a course of conduct is a matter which must be drawn from the conduct itself and circumstances surrounding it, from the conduct and demeanor of the appellant upon the witness stand,—from the “gestalt.” *Battjes v. United States* (C.A. 6th 1949) 172 F. 2d 1,¹ and *United States v. Cole*, (D.C. S.D. Cal. 1950) 90 F. Supp. 147.²

The original opinion in this case was returned by this court on November 14, 1957, *Wilson v. United States*, 250 F. 2d 312. It is beyond all controversy that this court determined that the evidence was sufficient to support the verdict if at the time of

¹“Direct proof of wilful intent is not necessary. It may be inferred from the acts of the parties, and such inference may arise from a combination of acts, although each act standing by itself may seem unimportant. It is a question of fact to be determined from all the circumstances.” [Italics supplied.]

²“... we have to consider what the Germans express by the word, the *gestalt*. ‘Gestalt,’ as used in psychology or philosophy, means that in considering a situation we must take into consideration everything which bears upon it, both objective and subjective.”

pronouncement of that verdict the trial court had in mind the proper principles of law concerning the degree of proof of willfulness necessary in cases of this type.³ Comments of the trial judge made during the trial were cited in that opinion, and this court concluded that it did not appear that the trial court had in mind the proper conception of the law as delineated in the opinion. Therefore, it was held that the case should be remanded to the district court for a new trial. Thereafter, the Government petitioned for a rehearing wherein it was argued that a review of the entire record, regarding it in the light most favorable to the Government, disclosed that the trial court did apply the proper standard of willfulness to the offense. (Appellee's petition for rehearing, No. 15,301, page 3.) The petition went on to state that "Since this Honorable Court agrees that the evidence was adequate to establish wilful positive acts of evasion, or in other words, a wilful attempt to defeat

³"... the diversion of available funds to affiliates and other creditors in preference to payment of Government obligations qualifies as an affirmative act under the statute and would warrant conviction if done with the requisite state of mind." (R. 20.)

"... It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by a desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by § 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under § 2707(a). All these possibilities exist.

"... The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained." (R. 33.)

and evade the payment of withholding and social security taxes, the question narrows down to the issue of whether such acts were done with the requisite state of mind.” The petition went on to advise the court that “The trial of this case consumed nine days and resulted in 973 pages of the printed record and voluminous accounting exhibits. *To require retrial solely for the purpose of affording the trial Court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court’s opinion would entail unnecessary expenditure of time and money. There being no other error, it is manifest that the trial Court having the record before it could readily make such special findings under Rule 23 as may be necessary to clarify the factual basis upon which he determined the existence of appellant’s specific wilful intent to evade payment of the withheld taxes.*” [Italics supplied.]

With this brief in mind and as a direct result thereof, on February 27, 1958, this court by written order amended the written opinion of November 14, 1957, by striking out the paragraph remanding the case to the trial court for a new trial and inserting the following, *Wilson v. United States*, 250 F. 2d 312:

“The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.”

The material facts in this case have never been in any substantial dispute. The only thing in contention is what conclusions should be drawn from those facts. It is clear (1) that the Court of Appeals in the original opinion filed November 14, 1957, held that the trial court probably did not use the proper standards of law in drawing the conclusion of willful intent on the part of the appellant; (2) that the Government filed a petition for rehearing in which they respectfully took issue with that conclusion of the court and suggested that in lieu of a complete retrial the matter be referred back to the trial judge in order to clarify the standard that he had used in adjudging the appellant guilty as charged; and (3) that on consideration of the brief the Court of Appeals did remand the matter back to the trial court for that specific purpose and to allow the Government and/or the defendant to place additional evidence into the record bearing on this particular question.

This partial remand was immediately recognized by the appellant as such and was attacked in his petition to this court in a document entitled "Petition for Rehearing and Petition for Recall of Mandate and for Leave to File Petition for Rehearing." After due consideration of appellant's position, the Court of Appeals in an opinion dated April 16, 1958, held that the partial remand was proper and warranted, *Wilson v. United States*, 254 F. 2d 391.

The second section of the remand calling for further findings by the trial court after the parties had been accorded an opportunity to introduce additional

evidence has become moot in view of the fact that no additional evidence was adduced.

The first portion of the remand required the trial judge to give reconsideration to the case in accordance with the principles set forth in the opinion. The words "the principles set forth in this opinion" refer to the law concerning the proper degree of proof required for a finding of willfulness in a tax evasion case. The trial judge in his opinion, findings and decision filed July 28, 1958, stated "I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel." (R. 79.) He went on to find that his conception of the constituent elements of the offense was the same as it was at the time of judgment, and that "The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts." (R. 82.)

The conception of the law by the trial judge is a subjective matter and the person most qualified to state unequivocally what his conception of the law was at the time of the decision is the trial judge himself. Certainly every favorable inference should be accorded his veracity and integrity. If credence is given to this finding of the trial court, certainly the mandate of the Court of Appeals does not require the trial court to laboriously detail findings of fact and conclusions of law to reach the same conclusion.

The appellant argues that the trial judge did not review the record of the first trial and has refused to

do so. His argument has been drawn from a comment made by the trial court during the argument on rehearing. A contrary conclusion must be drawn from the written opinion, findings and conclusions promulgated by the trial court on July 28, 1958, ten days after the rehearing. In that written opinion, findings and decision the trial judge recited, "I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the argument and written suggestions of counsel." (R. 79.) From these words it is respectfully submitted it cannot but be assumed the trial court reviewed the record. It is of course true that the trial judge refused to laboriously detail findings of fact, contenting himself with the one and only necessary finding of his conception of the law at the time of the original decision. Once again, appellant has confused the oral comments of the court made during the argument with the formal findings as embodied in the written opinion.

But, appellant argues, upon the rehearing, appellee presented to the district court a detailed document containing such detailed findings of fact and conclusions of law and, therefore, the Government itself construed the mandate as requiring this useless and tedious analysis of a dry record. Of course, it devolved upon the Government to be prepared for any contingency, and had the district judge determined that in the original decision he had applied the wrong standard of law, then he may have felt required to detail the facts and determine under the proper standards of the degree of proof of willfulness re-

quired, whether or not he should draw the ultimate conclusion of guilt. The findings of fact and conclusions of law were presented by the Government to aid him in that endeavor should it be necessary. It has always been the position of the Government in this case that there was a clear showing of conduct from which the determination of the existence of the evil motive of tax evasion could be drawn and, accordingly, the Government had no hesitation in denominating and delineating some of those facts for the use and assistance of the trial court.

To recapitulate, it is the contention of the Government that the mandate called for an initial determination by the trial judge as to whether or not he had applied the proper principles of law to the facts in making his original decision. The trial court has found as a fact that he did apply the proper principles of law in making his original decision and, consequently, it is not necessary to consider what he would have to do by way of making specific and detailed findings of fact (if these indeed were required) in the event he found that he initially did not apply the proper principles of law. Appellant argues that he was *too* required to make specific and detailed findings of fact from which the evil motive of tax evasion had been concluded even though he should determine that he had applied the proper principles of law in the initial decision. The Government submits that this Honorable Court will not and did not require the trial court to perform the tedious and useless labor of an idle act.

II.

THE APPELLANT'S OTHER ASSIGNMENTS OF ERROR HAVE HERETOFORE BEEN ADJUDICATED BY THE COURT OF APPEALS AND SUCH ADJUDICATIONS CONSTITUTE THE RULE OF THE CASE.

(a) Partial Remand Was Proper and so Adjudicated by Written Opinion of This Honorable Court Filed April 16, 1958.

Appellant's argument candidly admits that the court has already adjudicated the propriety of a partial remand in this case. (Appellant's brief, p. 26.) Since this is so, this adjudication constitutes the rule of the case and should not be reargued on this appeal. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; and *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S.Ct. 74; 72 L. ed. 231.

We might add that in his specification of errors appellant alleges that the district court committed error, but his argument is all directed to the alleged error of the Court of Appeals in remanding this matter for reconsideration rather than retrial. We note also that his argument in this section tacitly admits that the trial court properly construed the mandate of the Court of Appeals, a position which is rather inconsistent with the argument contained in the first section of his brief.

The only question reflected in the original opinion of the Court of Appeals in this case was whether the trial court had used the proper criterion in determining the degree of willfulness which the evidence imputed to the defendant. The trial court stated that it wholly agreed with the criterion established in the

opinion of the Court of Appeals, that it originally used that criterion, and was still of the same opinion. Appellant would now have this court reverse itself, remand the case for retrial, recall the witnesses to recite over again the same acts of the appellant that they did in the original trial, require the trial judge to recite the same conclusion from the same findings of fact, and, presumably, take the same appeal to this court a third time. The uncertainty in the original appeal has been cured; the lack is supplied. Must there be a repetition of the play because appellant does not agree with the statement of the trial court that he had the proper frame of mind at the time judgment was pronounced? Should appellant be permitted to attack the integrity of the trial court on this subjective matter?

Propriety of the remand has heretofore been determined and constitutes the rule of the case.

(b) There Was Substantial Evidence to Support the Conviction as Adjudicated by the Court of Appeals by Opinion Filed November 14, 1957, as Amended by Order of February 27, 1958.

Despite the fact that the district court has twice held there was substantial evidence to support the conviction, and despite the fact that the Court of Appeals has held that there is substantial evidence to support the conviction,⁴ appellant argues to the contrary. The decision of the Court of Appeals on the prior appeal, at Record 33, is dismissed by the appellant as dictum. In fact, it is painfully apparent that

⁴See footnote 3, page 12.

appellant does not consider himself bound by any of the prior decisions in this case. It is clear that the prior decision of the Court of Appeals constitutes the rule of the case and should not be disturbed in this proceeding. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S.Ct. 74; 72 L. ed. 231.

Assuming *arguendo* that appellant is entitled once more to contest the substantiality of the evidence, the Government is content to rest upon its arguments in its brief on the original appeal, and on those in its petition for rehearing, as well as the opinion of this court that there is substantial evidence to support the conviction. Although appellant's brief seems to indicate to the contrary, there is no evidence other than that adduced in the original trial before this court for consideration.

- (c) **The Exclusion of Evidence of Negotiations With the Internal Revenue Service in 1955 Was Not Error and Was Adjudicated by the Court of Appeals in the Opinion Entered Herein on November 14, 1957, as Amended by Order of February 27, 1958.**

Appellant again argues that evidence of appellant's negotiations with representatives of the Internal Revenue Service in 1955 should have been admitted by the trial court even though this question was specifically decided by this court in the opinion of November 14, 1957, *Wilson v. United States*, 250 F. 2d 312. Appellant does not even deign to argue the matter in his present brief but in all innocence refers this court to the argument in his brief on that prior ap-

peal. The adjudication of this court constitutes the rule of the case. *Fisher v. United States* (C.A. 9th, 1958), 254 F. 2d 302, 304; and *Marron v. United States* (C.C.A. 9th, 1926), 18 F. 2d 218; affirmed 275 U.S. 192; 48 S. Ct. 74; 72 L. ed. 231.

CONCLUSION.

The district court complied with the mandate of the Circuit Court and reconsidered its decision in the light of the principles expressed by the Court of Appeals in its opinion dated November 14, 1957, as amended by order of February 27, 1958. The other assignments of error alleged by appellant have heretofore been adjudicated by this court and appellant is bound thereby since they constitute the rule of the case. The appeal should be dismissed.

Dated, San Francisco, California,
January 22, 1959.

Respectfully submitted,

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No. 16,184

IN THE
United States Court of Appeals
For the Ninth Circuit

ARTHUR KING WILSON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

REPLY BRIEF FOR APPELLANT.

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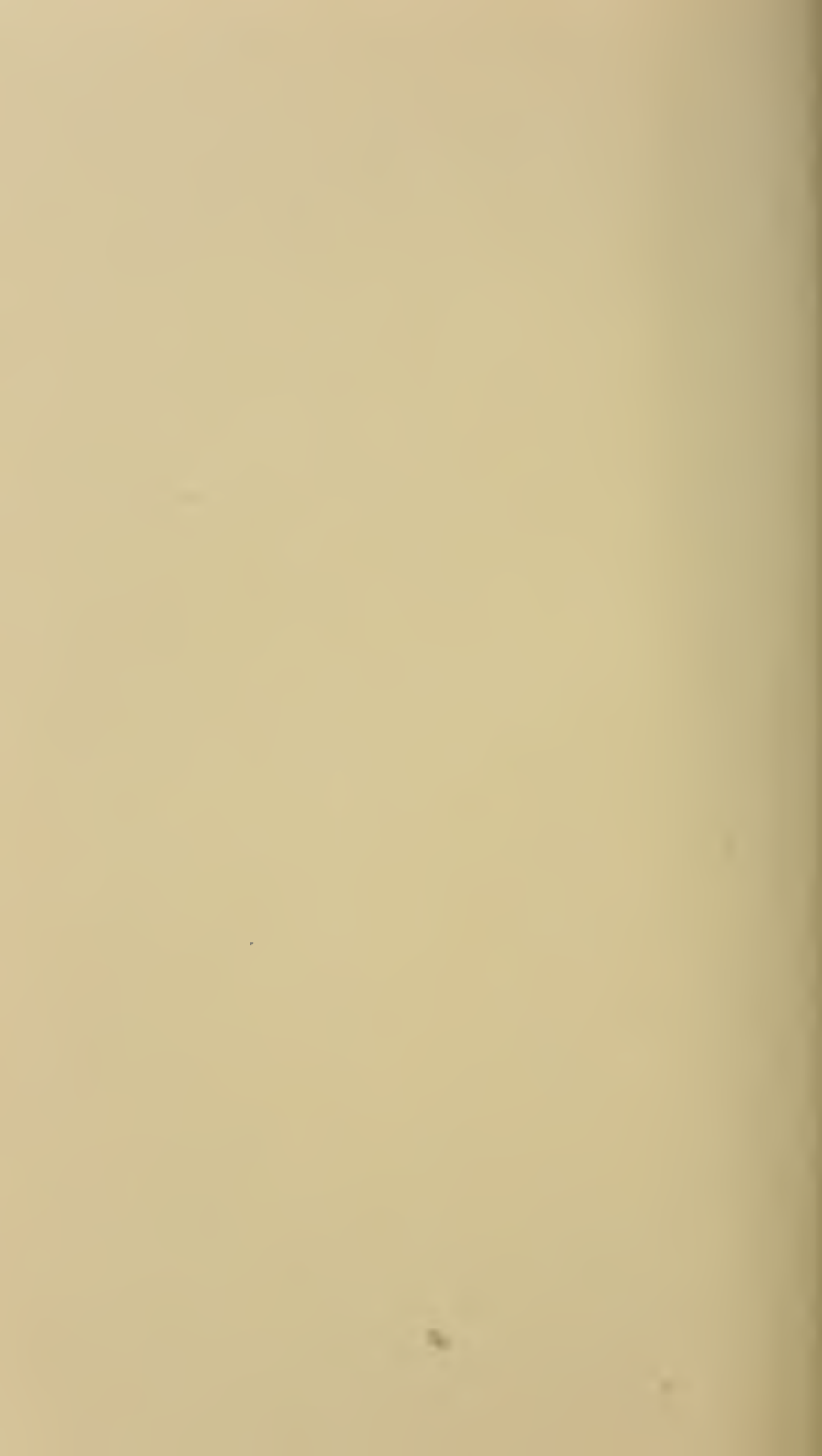


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IN THE

**United States Court of Appeals
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ARTHUR KING WILSON,

Appellant,

VS.

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Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

REPLY BRIEF FOR APPELLANT.

Appellee seeks to circumvent the trial court's refusal to reconsider the evidence and to set forth findings of fact by urging (1) that the remand was for the purpose of having the trial judge determine "whether or not the trial judge had the proper principles of law in mind at the time of his original decision" (Br. for U.S., p. 10; see also pp. 7, 8), and (2) that the requirement of factual findings was intended to apply only if the trial judge concluded that he had initially applied the wrong principles of law. (Br. for U.S., p. 17; see also pp. 7, 14-15.)

But this argument is apparently not offered with any great confidence, for Appellee also contends (Br. for U.S., p. 16) that the trial judge *must be assumed to have reviewed the trial record*, notwithstanding the trial judge's emphatic statement on two occasions that he would not and could not "redetermine the guilt or innocence of the defendant on the record" (R. 124) or "render a new decision on the same facts two years after the event." (R. 121.)

Appellee has nimbly shifted its position since the remand hearing without even a blushing reference to the inconsistencies between its present arguments and its former ones.

On the prior appeal (No. 15,301), Appellee, in its Petition for Rehearing (p. 11; for pertinent portion, see Brief for Appellant, p. 23), argued against the time and expense of a retrial, and urged instead that the trial judge could "*reappraise the evidence*" and, "*having the record before it,*" could make special findings under Rule 23 to clarify "*the factual basis*" upon which the existence of wilful intent was determined. (Italics added.)

During the remand hearing, Appellee specifically stated, as its interpretation of the mandate, that the trial court was under instructions to reconsider the evidence for the purpose of making findings (R. 87), that the facts had to be reviewed to see whether or not they made out the requisite intent (R. 90), that the court should relate its finding to the significant pieces of evidence upon which the finding was based (R. 124), that the Court of Appeals had in effect

made a motion for special findings under Rule 23 on behalf of Appellant (R. 126), and that the mandate called for special findings “*whether or not new evidence was introduced.*” (R. 134, italics added.)

Appellee *now* contends that “the mandate called for an initial determination by the trial judge as to whether or not he had applied the proper principles of law to the facts in making his original decision,” and that, if the trial judge concluded that he had originally applied the correct law, the making of factual findings would be “the tedious and useless labor of an idle act” which “this Honorable Court will not and did not require the trial court to perform.” (Br. for U.S., p. 17.)

To support this construction, Appellee erroneously states that this Court “held that the trial court *probably* did not use the proper standards of law.” (Br. for U.S., p. 14, italics added.) In fact, the decision of this Court declared that this was a case in which the trial court’s views were set forth “with certitude and clarity”, and were “clear statements . . . expressed on numerous occasions.” (R. 24.) Moreover, the Court took the trouble to set forth at considerable length, in footnote 13 of its opinion (R. 25-30), some of the statements of the trial judge which clearly and unequivocally show that the trial judge had specifically rejected the very legal principles which this Court held applicable.

The purpose of the mandate was not to have the trial court exercise appellate review of this Court’s

decision, but to implement that decision by having the trial court *reappraise the evidence and make special findings*, as specifically requested by Appellee in its Petition for Rehearing, rather than having a complete new trial. The provision in the mandate for presentation of additional evidence by the Government was no doubt prompted by the possibility that the Government, in reliance on the erroneous rules of law stated by the trial court during the trial, might not have presented all of the available evidence bearing on intent.

It is clear that the trial judge did not reconsider the evidence, notwithstanding Appellee's effort to assume the contrary. The trial judge was quite frank in saying that such reconsideration was impossible, and he repeated this with considerable emphasis in response to the efforts of Appellee's Counsel to patch up the record by suggesting that the trial judge had meant to say that his recollection had faded only as to "minor details and . . . analyses of . . . documents." (R. 121, 122-3, 124.) There is nothing to the contrary in the written Opinion, Findings and Decision. (R. 78-82.) Indeed, the Opinion shows that the finding of intent is based on the trial judge's reasoning that, since he considered that he had always held to the correct rule of law, he would not originally have found Appellant guilty without convincing evidence of evil intent. (R. 79-80; see also the trial judge's explanation of the first decision at R. 138.) This is a far cry from a reconsideration or reappraisal of the evidence.

The belief expressed by the trial judge during the remand hearing that he had “never had any contrary views to that stated by the Court of Appeals with respect to the necessity of tax evasion motive and wilfulness being present,” and that he had “never indicated anything to the contrary” (R. 121-2) corroborates the dimness of his recollection of the trial. The statements of the trial judge quoted in the opinion on the prior appeal (R. 25-30) need not be repeated here, beyond mentioning that, even at the end of the trial, the judge reiterated his view that the requirement of evil intent which applied in income tax evasion cases was not present in withholding tax cases.

The trial court’s confessed inability to reconsider evidence heard two years earlier was not, of course, contemplated by this Court when it remanded the case for that purpose (nor, obviously, by appellee when it suggested such a remand). The Court’s reliance on *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956), in denying appellant’s Petition for Rehearing (R. 38; 254 F. 2d 391) shows that the Court had in mind a reconsideration of the evidence, and the making of specific findings. In that case, the matter was remanded for consideration of certain claims regarding perjured testimony. The decision states that, whether the challenged testimony was sustained or discredited on the remand hearing (351 U.S. at 125),

“In either event, the Board must then reconsider its original determination in the light of the rec-

ord as freed from the challenge that now beclouds it.”

Similarly, the manner in which this Court distinguished the cases cited in our Petition for Rehearing shows that the remand contemplated a reconsideration of the facts. In its discussion of those cases, the Court emphasized the propriety of a partial remand to take additional evidence and to make findings based on the combination of the old record and the new one.

Moreover, even if the situations were otherwise similar (which it is now clear they are not), the *Communist Party* case involved an administrative proceeding and would not set the standards of due process required in criminal trials.

Appellee's effort (Br. for U.S., p. 18) to preclude consideration of the propriety of the remand by raising the doctrine of “law of the case” misconceives the nature and effect of that legal principle. The doctrine has no application where new elements which did not appear on the former appeal are shown; and the significant new circumstance here is the trial judge's confessed inability to reconsider the evidence. *Insurance Group Committee v. Denver and Rio Grande W. R. Co.*, 329 U.S. 607, 611-3 (1947).

Moreover, this doctrine simply expresses a practice, and is not a limitation on the reviewing Court's power. *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). There is nothing to the contrary in *Fisher v. U.S.*, 254 F. 2d 302, 304 (9th Cir. 1958), upon which

Appellee relies, since the Appellate Court in that case actually reviewed the merits of its prior ruling before deciding to adhere to it.

Appellee also invokes the "law of the case" doctrine on the issue of the sufficiency of the evidence (Br. for U.S., pp. 19-20); but the doctrine applies only to matters actually determined on the prior appeal, and, clearly, there was no holding on that issue, since the judgment was set aside and the case remanded for reconsideration of the evidence. Even the authorities cited by Appellee do not support its position. In *Marron v. U.S.*, 18 F. 2d 218, 219 (9th Cir. 1927), the rule is stated as follows:

"Where the evidence is the same, and the charge identical, a final decision on appeal establishes the rule, or law of the case, which will govern the second trial."

It seems strange that Appellee, having shown familiarity with the "law of the case" doctrine, nevertheless ignores it as to the one point to which it does apply—namely, the holding that the first judgment was based on an erroneous rule of law.

What is involved here, in substance and effect, is a continuance of two years in a criminal trial, followed by a resubmission of the record to the trier of facts. That of itself would appear to be improper. See *United States v. Alker*, 260 F. 2d 135, 159 (3rd Cir. 1958), where a delay of two months was termed "hardly . . . commensurate with the minimal standards. . . ."

But here the trier of the facts frankly confessed inability to reconsider the record. What was contemplated by the remand was considered impossible by the trial court.

Accordingly, the judgment should be reversed.

Dated, February 5, 1959.

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